UNITED STATES REPORTS

VOLUME 443

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1978

JUNE 25 THROUGH AUGUST 30, 1979

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

HENRY C. LIND

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.

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GRIFFIN B. BELL, Attorney General.[1]
BENJAMIN R. CIVILETTI, Attorney General.[2]
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
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[1] Attorney General Bell resigned effective August 16, 1979.

[2] The Honorable Benjamin R. Civiletti, of Maryland, Deputy Attorney General, was nominated to be Attorney General by President Carter on July 21, 1979. The nomination was confirmed by the Senate on August 1, 1979; he was commissioned on August 16, 1979, and took the oath of office on the same date.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1978

MACKEY, REGISTRAR OF MOTOR VEHICLES OF MASSACHUSETTS *v.* MONTRYM

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 77–69. Argued November 29, 1978—Decided June 25, 1979

A Massachusetts statute mandates suspension of a driver's license for refusing to take a breath-analysis test upon arrest for operating a motor vehicle while under the influence of intoxicating liquor. The Registrar of Motor Vehicles must order a 90-day suspension upon receipt of the police report of the licensee's refusal to take such test; the licensee, after surrendering his license, is entitled to an immediate hearing before the Registrar. Appellee, whose license was suspended under the statute, brought a class action in Federal District Court alleging that the Massachusetts statute was unconstitutional on its face and as applied in that it authorized the suspension of his license without affording him a presuspension hearing. The District Court held that appellee was entitled as a matter of due process to some sort of presuspension hearing, declared the statute unconstitutional on its face as violative of the Due Process Clause of the Fourteenth Amendment, and granted injunctive relief.

Held: The Massachusetts statute is not void on its face as violative of the Due Process Clause. Cf. *Dixon* v. *Love*, 431 U. S. 105. Pp. 10–19.

(a) Suspension of a driver's license for statutorily defined cause implicates a property interest protected by the Due Process Clause. Resolution of the question of what process is due to protect against an erroneous deprivation of a protectible property interest requires consideration

of (i) the nature and weight of the private interest affected by the official action challenged; (ii) the risk of an erroneous deprivation of such interest as a consequence of the summary procedures used; and (iii) the governmental function involved and state interests served by such procedures, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought. *Mathews* v. *Eldridge*, 424 U. S. 319. Pp. 10–11.

(b) Here, neither the nature of the private interest involved—the licensee's interest in the continued possession and use of his license pending the outcome of the hearing due him—nor its weight compels a conclusion that the summary suspension procedures are unconstitutional, particularly in view of the postsuspension hearing immediately available and of the fact that the suspension is for a maximum of only 90 days. Pp. 11–12.

(c) Nor is the risk of error inherent in the presuspension procedure so substantial in itself as to require a departure from the "ordinary principle" that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Dixon* v. *Love*, *supra*, at 113. The risk of erroneous observation or deliberate misrepresentation by the reporting police officer of the facts forming the basis for the suspension is insubstantial. When there are disputed facts, the risk of error inherent in the statute's initial reliance on the reporting officer's representations is not so substantial in itself as to require the Commonwealth to stay its hand pending the outcome of any evidentiary hearing necessary to resolve questions of credibility or conflicts in the evidence. Pp. 13–17.

(d) Finally, the compelling interest in highway safety justifies Massachusetts in making a summary suspension effective pending the outcome of the available prompt postsuspension hearing. Such interest is substantially served by the summary suspension because (i) it acts as a deterrent to drunk driving; (ii) provides an inducement to take the breath-analysis test, permitting the Commonwealth to obtain a reliable form of evidence for use in subsequent criminal proceedings; and (iii) summarily removes from the road licensees arrested for drunk driving who refuse to take the test. Conversely, a presuspension hearing would substantially undermine the Commonwealth's interest in public safety by giving drivers an incentive to refuse the breath-analysis test and demand such a hearing as a dilatory tactic, which in turn would cause a sharp increase in the number of hearings sought and thus impose a substantial fiscal and administrative burden on the Commonwealth. Nor is it any answer to the Commonwealth's interest in public safety

promoted by the summary sanction that such interest could be served as well in other ways. A state has the right to offer incentives for taking the breath-analysis test and, in exercising its police powers, is not required by the Due Process Clause to adopt an "all or nothing" approach to the acute safety hazard posed by drunk drivers. Pp. 17–19.

429 F. Supp. 393, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 19.

Mitchell J. Sikora, Jr., Assistant Attorney General of Massachusetts, argued the cause for appellant. With him on the briefs were *Francis X. Bellotti*, Attorney General, and *S. Stephen Rosenfeld* and *Steven A. Rusconi*, Assistant Attorneys General.

Robert W. Hagopian argued the cause and filed a brief for appellee.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this appeal is whether a Massachusetts statute that mandates suspension of a driver's license because of his refusal to take a breath-analysis test upon arrest for driving while under the influence of intoxicating liquor is void on its face as violative of the Due Process Clause of the Fourteenth Amendment.

Commonly known as the implied consent law, the Massachusetts statute provides:

> "Whoever operates a motor vehicle upon any [public] way . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. . . . If the person arrested refuses to submit to such test or analysis, after

having been informed that his license . . . to operate motor vehicles . . . in the commonwealth shall be suspended for a period of ninety days for such refusal, no such test or analysis shall be made, but the police officer before whom such refusal was made shall immediately prepare a written report of such refusal[, which] . . . shall be endorsed by a third person who shall have witnessed such refusal[,] . . . shall be sworn to under the penalties of perjury by the police officer before whom such refusal was made[,] . . . shall set forth the grounds for the officer's belief that the person arrested had been driving a motor vehicle . . . while under the influence of intoxicating liquor, and shall state that such person had refused to submit to such chemical test or analysis when requested by such police officer to do so. Each such report shall be endorsed by the police chief . . . and shall be sent forthwith to the registrar. Upon receipt of such report, the registrar shall suspend any license or permit to operate motor vehicles issued to such person . . . for a period of ninety days." Mass. Gen. Laws Ann., ch. 90, § 24 (1)(f) (West Supp. 1979).

I

While driving a vehicle in Acton, Mass., appellee Donald Montrym was involved in a collision about 8:15 p. m. on May 15, 1976. Upon arrival at the scene of the accident an Acton police officer observed, as he wrote in his official report, that Montrym was "glassy eyed," unsteady on his feet, slurring his speech, and emitting a strong alcoholic odor from his person. The officer arrested Montrym at 8:30 p. m. for operating his vehicle while under the influence of intoxicating liquor, driving to endanger, and failing to produce his motor vehicle registration upon request. Montrym was then taken to the Acton police station.

There, Montrym was asked to take a breath-analysis examination at 8:45 p. m. He refused to do so.[1] Twenty minutes after refusing to take the test and shortly after consulting his lawyer, Montrym apparently sought to retract his prior refusal by asking the police to administer a breath-analysis test. The police declined to comply with Montrym's belated request. The statute leaves an officer no discretion once a breath-analysis test has been refused: "If the person arrested refuses to submit to such test or analysis, . . . the police officer before whom such refusal was made *shall immediately* prepare a written report of such refusal." § 24 (1)(f) (emphasis added). The arresting officer completed a report of the events, including the refusal to take the test.

As mandated by the statute, the officer's report recited (a) the fact of Montrym's arrest for driving while under the influence of intoxicating liquor, (b) the grounds supporting that arrest, and (c) the fact of his refusal to take the breath-analysis examination. As required by the statute, the officer's report was sworn to under penalties of perjury, and endorsed by the arresting officer and another officer present when Montrym refused to take the test; it was counterendorsed by the chief of police. The report was then sent to the Massachusetts Registrar of Motor Vehicles pursuant to the statute.

On June 2, 1976, a state court dismissed the complaint brought against Montrym for driving while under the influence of intoxicating liquor.[2] Dismissal apparently was predicated on the refusal of the police to administer a breath-analysis test at Montrym's request after he sought to retract his initial

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[1] Montrym does not deny having refused the test; he claims that he was not advised of the mandatory 90-day suspension penalty prior to his refusal, as required by the statute; however, the officer's report of refusal asserts that Montrym was given the required prior warning.

[2] Montrym was also acquitted on the driving-to-endanger charge but was found guilty on the registration charge and fined $15.

refusal to take the test. The dismissal order of the state court cryptically recites:

> "Dismissed. Breathalyzer refused when requested within ½ hr of arrest at station. See affidavit & memorandum."

According to Montrym's affidavit incorporated by reference in the state court's dismissal order, he was visited by an attorney at 9:05 o'clock on the night of his arrest; and, after consulting with counsel, he requested a breath-analysis test. The police, however, refused the requests made by Montrym and his counsel between 9:07 and 10:07 p. m.

Montrym's attorney immediately advised the Registrar by letter of the dismissal of this charge and asked that the Registrar stay any suspension of Montrym's driver's license. Enclosed with the letter was a copy of Montrym's affidavit attesting to the officer's refusal to administer a breath-analysis test at his request. However, Montrym's attorney did not enclose a certified copy of the state court's order dismissing the charge.

The Registrar, who has no discretionary authority to stay a suspension mandated by the statute,[3] formally suspended Montrym's license for 90 days on June 7, 1976. The suspension notice stated that it was effective upon its issuance and directed Montrym to return his license at once. It advised Montrym of his right to appeal the suspension.[4]

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[3] It provides in relevant part:

"Upon receipt of such report [of refusal], the registrar *shall* suspend any license . . . issued to such person . . . for a period of ninety days." Mass. Gen. Laws Ann., ch. 90, § 24 (1)(f) (West Supp. 1979) (emphasis added).

[4] Massachusetts Gen. Laws Ann., ch. 90, § 28 (West 1969), provides that any person aggrieved by a ruling of the Registrar may appeal such ruling to the Board of Appeal, which may, after a hearing, order such ruling to be affirmed, modified, or annulled. However, no such appeal shall operate to stay any ruling of the Registrar. In turn, the Board's decision is subject to judicial review. Mass. Gen. Laws Ann., ch. 30A, § 14 (West 1979).

When Montrym received the suspension notice, his attorney requested an appeal on the question of whether Montrym had in fact refused a breath-analysis test within the meaning of the statute. Montrym surrendered his license by mail on June 8, 1976.

Under the Massachusetts statute, Montrym could have obtained an *immediate* hearing before the Registrar at any time after he had surrendered his license; that hearing would have resolved all questions as to whether grounds existed for the suspension.[5] For reasons not explained, but presumably

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[5] Massachusetts Gen. Laws Ann., ch. 90, § 24 (1)(g) (West 1969), provides:

"Any person whose license, permit or right to operate has been suspended under paragraph (*f*) shall be entitled to a hearing before the registrar which shall be limited to the following issues: (1) did the police officer have reasonable grounds to believe that such person had been operating a motor vehicle while under the influence of intoxicating liquor upon any [public] way . . . , (2) was such person placed under arrest, and (3) did such person refuse to submit to such test or analysis. If, after such hearing, the registrar finds on any one of the said issues in the negative, the registrar shall reinstate such license, permit or right to operate."

As stipulated by the parties, the § 24 (1)(g) hearing is available the moment the driver surrenders his license. At the hearing, the suspended driver may be represented by counsel. Upon request, a hearing officer will examine the report of refusal and return the driver's license immediately if the report does not comply with the requirements of § 24 (1)(f). If the report complies with those requirements, the burden is on the driver to show either that he was not arrested, that there was no probable cause for arrest, or that he did not refuse to take the breath-analysis test. The hearing may be adjourned at the request of the driver or *sua sponte* by the hearing officer in order to permit the attendance of witnesses or for the gathering of relevant evidence. Witnesses at the hearing are subject to cross-examination by the driver or his attorney, and he may appeal an adverse decision of the Registrar to the Board of Appeal pursuant to § 28.

The Registrar has represented to the Court that a driver can obtain a decision from the hearing officer within one or two days following the driver's receipt of the suspension notice. Montrym asserts that greater delay will occur if the driver raises factual issues requiring the taking of

on advice of counsel, Montrym failed to exercise his right to a hearing before the Registrar; instead, he took an appeal to the Board of Appeal. On June 24, 1976, the Board of Appeal advised Montrym by letter that a hearing of his appeal would be held on July 6, 1976.

Four days later, Montrym's counsel made demand upon the Registrar by letter for the return of his driver's license. The letter reiterated Montrym's acquittal of the driving-under-the-influence charge, asserted that the state court's finding that the officer had refused to administer a breath-analysis test was binding on the Registrar, and declared that suspension of Montrym's license without first holding a hearing violated his right to due process. The letter did not contain a copy of the state court's dismissal order, but did threaten the Registrar with suit if the license were not returned immediately. Had Montrym's counsel enclosed a copy of the order dismissing the drunken-driving charge, the entire matter might well have been disposed of at that stage without more.

Thereafter, forgoing his administrative appeal scheduled for hearing on July 6, Montrym brought this action asking the convening of a three-judge United States District Court. The complaint alleges that § 24 (1)(f) is unconstitutional on its face and as applied in that it authorized the suspension of Montrym's driver's license without affording him an opportunity for a presuspension hearing. Montrym sought a temporary restraining order enjoining the suspension of his license, compensatory and punitive damages, and declaratory and injunctive relief on behalf of all persons whose licenses had been suspended pursuant to the statute without a prior hearing.

On July 9, 1976, a single District Judge issued the temporary restraining order sought by Montrym and directed

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evidence. But, even under his more pessimistic view, which takes into account the possibility of intervening weekends, the driver will obtain a decision from the hearing officer within 7 to 10 days.

the Registrar to return Montrym's license pending further order of the court. Subsequently, a three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281 (1970 ed.), 2284, and Montrym moved for partial summary judgment on stipulated facts.

With one judge dissenting, the three-judge District Court granted Montrym's motion. Relying principally on this Court's decision in *Bell* v. *Burson,* 402 U. S. 535 (1971), the District Court concluded that Montrym was entitled as a matter of due process to some sort of a presuspension hearing before the Registrar to contest the allegation of his refusal to take the test. In a partial summary judgment order issued on April 4, and a final judgment order issued on April 12, the District Court certified the suit under Fed. Rule Civ. Proc. 23 (b)(2) as a class action on behalf of all persons whose licenses to operate a motor vehicle had been suspended pursuant to Mass. Gen. Laws Ann., ch. 90, § 24 (1)(f) (West Supp. 1979). The court then declared the statute unconstitutional on its face as violative of the Due Process Clause, permanently enjoined the Registrar from further enforcing the statute, and directed him to return the driver's licenses of the plaintiff class members. *Montrym* v. *Panora,* 429 F. Supp. 393 (Mass. 1977).

After taking timely appeals from the District Court's judgment orders, the Registrar moved the District Court for a stay and modification of its judgment, which motions were denied. After release of our opinion in *Dixon* v. *Love,* 431 U. S. 105 (1977), upholding the constitutionality of an Illinois statute authorizing the summary suspension of a driver's license prior to any evidentiary hearing, the Registrar moved for reconsideration of his motions for a stay and modification of judgment.

In a second opinion issued October 6, 1977, the District Court reasoned that *Love* was distinguishable on several grounds and denied the Registrar's motion to reconsider; the

dissenting judge thought *Love* controlled. *Montrym* v. *Panora*, 438 F. Supp. 1157 (Mass. 1977).

We noted probable jurisdiction following the submission of supplemental briefs by the parties. *Sub nom. Panora* v. *Montrym*, 435 U. S. 967 (1978). We reverse.[6]

II

The Registrar concedes here that suspension of a driver's license for statutorily defined cause implicates a protectible property interest;[7] accordingly, the only question presented by this appeal is what process is due to protect against an erroneous deprivation of that interest. Resolution of this inquiry requires consideration of a number of factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

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[6] Because the District Court held the statute unconstitutional on its face and granted classwide relief, it never reached the "as applied" challenge raised in Montrym's complaint; nor do we. The validity of that challenge, and the resolution of any contested factual issues relevant to it, must be determined by the District Court on remand in light of our opinion.

Also, the question of whether the Commonwealth is constitutionally required to give notice of the § 24 (1)(g) hearing procedure independent of the notice given by the statute itself was neither framed by the pleadings nor decided by the District Court; it is not properly before us notwithstanding the observations of the dissenting opinion on this issue. See *post*, at 27–28, and n. 4.

[7] That the Due Process Clause applies to a state's suspension or revocation of a driver's license is clear from our decisions in *Dixon* v. *Love*, 431 U. S. 105, 112 (1977), and *Bell* v. *Burson*, 402 U. S. 535, 539 (1971).

Applying this balancing test, the District Court concluded due process required an opportunity for hearing before suspension of a license. 429 F. Supp., at 398–400. Later, the court further held that our decision in *Dixon* v. *Love, supra,* did not control. *Love* was thought distinguishable because the potential for irreparable personal and economic hardship was regarded as greater under the Massachusetts statutory scheme than the Illinois scheme; the risk of error was deemed more substantial as well; and requiring a hearing before suspending a driver's license for refusing to take a breath-analysis test was believed not to offend the state interest in safe highways. 438 F. Supp., at 1159–1161.

We conclude that *Love* cannot be materially distinguished from the case before us. Both cases involve the constitutionality of a statutory scheme for administrative suspension of a driver's license for statutorily defined cause without a presuspension hearing. In each, the sole question presented is the appropriate timing of the legal process due a licensee. And, in both cases, that question must be determined by reference to the factors set forth in *Eldridge.*

A

The first step in the balancing process mandated by *Eldridge* is identification of the nature and weight of the private interest affected by the official action challenged. Here, as in *Love,* the private interest affected is the granted license to operate a motor vehicle. More particularly, the driver's interest is in continued possession and use of his license pending the outcome of the hearing due him. As we recognized in *Love,* that interest is a substantial one, for the Commonwealth will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through postsuspension review procedures. 431 U. S., at 113.

But, however substantial Montrym's property interest may

be, it is surely no more substantial than the interest involved in *Love*. The private interest involved here actually is *less* substantial, for the Massachusetts statute authorizes suspension for a maximum of only 90 days, while the Illinois scheme permitted suspension for as long as a year and even allowed for the possibility of indefinite revocation of a license.

To be sure, as the District Court observed, the Illinois statute in *Love* contained provisions for hardship relief unavailable under the Massachusetts statute. Though we adverted to the existence of such provisions in *Love*, they were in no sense the "controlling" factor in our decision that the District Court believed them to be. 438 F. Supp., at 1159. Hardship relief was available under the Illinois scheme only *after* a driver had been suspended and had demonstrated his eligibility for such relief. See *Dixon* v. *Love*, 431 U. S., at 114 n. 10. The bearing such provisions had in *Love* stemmed from the delay involved in providing a postsuspension hearing. Here, unlike the situation in *Love*, a postsuspension hearing is available *immediately* upon a driver's suspension and may be initiated by him simply by walking into one of the Registrar's local offices and requesting a hearing. The *Love* statute, in contrast, did not mandate that a date be set for a postsuspension hearing until 20 days after a written request for such a hearing was received from the affected driver. *Id.*, at 109–110.

The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved. *Fusari* v. *Steinberg*, 419 U. S. 379, 389 (1975). The District Court's failure to consider the relative length of the suspension periods involved in *Love* and the case at bar, as well as the relative timeliness of the postsuspension review available to a suspended driver, was erroneous. Neither the nature nor the weight of the private interest involved in this case compels a result contrary to that reached in *Love*.

B

Because a primary function of legal process is to minimize the risk of erroneous decisions, *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 12–13 (1979); *Addington* v. *Texas*, 441 U. S. 418, 423 (1979), the second stage of the *Eldridge* inquiry requires consideration of the likelihood of an erroneous deprivation of the private interest involved as a consequence of the procedures used. And, although this aspect of the *Eldridge* test further requires an assessment of the relative reliability of the procedures used and the substitute procedures sought, the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible "property" or "liberty" interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations. *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, at 7. Thus, even though our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error, the "ordinary principle" established by our prior decisions is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Dixon* v. *Love*, *supra*, at 113. And, when prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be. See, *e. g.*, *Barry* v. *Barchi*, *post*, at 64–65; *Mathews* v. *Eldridge*, 424 U. S., at 334.

As was the case in *Love*, the predicates for a driver's suspension under the Massachusetts scheme are objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him. Cause arises for license suspension if the driver has been arrested for

driving while under the influence of an intoxicant, probable cause exists for arrest, and the driver refuses to take a breath-analysis test. The facts of the arrest and the driver's refusal will inevitably be within the personal knowledge of the reporting officer; indeed, Massachusetts requires that the driver's refusal be witnessed by two officers. At the very least, the arresting officer ordinarily will have provided the driver with an informal opportunity to tell his side of the story and, as here, will have had the opportunity to observe the driver's condition and behavior before effecting any arrest.

The District Court, in holding that the Due Process Clause mandates that an opportunity for a further hearing before the Registrar *precede* a driver's suspension, overstated the risk of error inherent in the statute's initial reliance on the corroborated affidavit of a law enforcement officer. The officer whose report of refusal triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the presuspension process. And, as he is personally subject to civil liability for an unlawful arrest and to criminal penalties for willful misrepresentation of the facts, he has every incentive to ascertain accurately and truthfully report the facts. The specific dictates of due process must be shaped by "the risk of error inherent in the truthfinding process as applied to the generality of cases" rather than the "rare exceptions." *Mathews* v. *Eldridge, supra,* at 344. And, the risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seems insubstantial.

Moreover, as this case illustrates, there will rarely be any genuine dispute as to the historical facts providing cause for a suspension. It is significant that Montrym does *not* dispute that he was arrested, or that probable cause existed for his arrest, or that he initially refused to take the breath-analysis test at the arresting officer's request. The allegedly "factual"

dispute that he claims a constitutional right to raise and have determined by the Registrar prior to his suspension really presents questions of law; namely, whether the state court's subsequent finding that the police *later* refused to administer a breath-analysis test at Montrym's request is binding on the Registrar as a matter of collateral estoppel; and, if so, whether that finding undermines the validity of Montrym's suspension, which may well be justified under the statute solely on the basis of Montrym's initial refusal to take the breath-analysis test and notwithstanding the officer's subsequent refusal to honor Montrym's belated request for the test.[8] The Commonwealth must have the authority, if it is to protect people from drunken drivers, to require that the breath-analysis test record the alcoholic content of the bloodstream at the earliest possible moment.

Finally, even when disputes as to the historical facts do arise, we are not persuaded that the risk of error inherent in the statute's initial reliance on the representations of the reporting officer is so substantial in itself as to require that the Commonwealth stay its hand pending the outcome of any evidentiary hearing necessary to resolve questions of credibility or conflicts in the evidence. Cf. *Barry* v. *Barchi*, *post*, at 64–65. All that Montrym seeks was available to him immediately upon his suspension, and we believe that the "same day" hearing before the Registrar available under § 24 (1)(g) provides an appropriately timely opportunity for the licensee to tell his side of the story to the Registrar, to obtain correction of clerical errors, and to seek prompt resolution of any factual disputes he raises as to the accuracy of the officer's report of refusal.

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[8] An evidentiary hearing into the historical facts would be ill suited for resolution of such questions of law. Indeed, it is not clear whether the Registrar even has the plenary authority to resolve such questions. Ultimately, any legal questions must be resolved finally by the Massachusetts courts on judicial review of the decision of the Board of Appeal after any appeal taken from the ruling of the Registrar. See n. 4, *supra*.

Nor would the avowedly "nonevidentiary" presuspension hearing contemplated by the District Court substantially enhance the reliability of the presuspension process. Clerical errors and deficiencies in the officer's report of refusal, of course, could be called to the Registrar's attention if the driver were provided with an opportunity to respond to the report in writing prior to suspension. But if such errors and deficiencies are genuinely material they already will have been noted by the Registrar in the ordinary course of his review of the report. Just as the Registrar has no power to stay a suspension upon receipt of a report of refusal that complies on its face with statutory requirements, he has no power to suspend a license if the report is materially defective. Necessarily, then, the Registrar must submit the officer's report to his independent scrutiny. This independent review of the report of refusal by a detached public officer should suffice in the ordinary case to minimize the only type of error that could be corrected by something less than an evidentiary hearing.

The only other purpose that might be served by an opportunity to respond to the report of refusal prior to a driver's suspension would be alerting the Registrar to the existence of factual disputes between the driver and the reporting officer. This would be an exercise in futility, for the Registrar has no discretion to stay a suspension pending the outcome of an evidentiary hearing. And, it simply begs the question of a driver's right to a presuspension *evidentiary* hearing to suggest, as did the District Court, that the Registrar be given such discretion. The Massachusetts Legislature has already made the discretionary determination that the District Court apparently would have the Registrar make on a case-by-case basis. It has determined that the Registrar, who is further removed in time and place from the operative facts than the reporting officer, should treat a report of refusal that complies on its face with the statutory requirements as presumptively accurate notwithstanding any factual disputes raised by a driver. Simply put, it has determined that the

Registrar is not in a position to make an informed probable-cause determination or exercise of discretion *prior* to an evidentiary hearing. We cannot say the legislature's judgment in this matter is irrational.

In summary, we conclude here, as in *Love,* that the risk of error inherent in the presuspension procedures chosen by the legislature is not so substantial in itself as to require us to depart from the "ordinary principle" that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." 431 U. S., at 113. We fail to see how reliability would be materially enhanced by mandating the presuspension "hearing" deemed necessary by the District Court.

C

The third leg of the *Eldridge* balancing test requires us to identify the governmental function involved; also, to weigh in the balance the state interests served by the summary procedures used, as well as the administrative and fiscal burdens, if any, that would result from the substitute procedures sought.

Here, as in *Love,* the statute involved was enacted in aid of the Commonwealth's police function for the purpose of protecting the safety of its people. As we observed in *Love,* the paramount interest the Commonwealth has in preserving the safety of its public highways, standing alone, fully distinguishes this case from *Bell* v. *Burson,* 402 U. S., at 539, on which Montrym and the District Court place principal reliance. See 431 U. S., at 114–115. We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs.[9] *E. g., Ewing* v.

[9] Drunken drivers accounted for 283 of the 884 traffic fatalities in Massachusetts during 1975 alone and must have been responsible for countless

Mytinger & Casselberry, Inc., 339 U. S. 594 (1950); *North American Storage Co.* v. *Chicago*, 211 U. S. 306 (1908).

The Commonwealth's interest in public safety is substantially served in several ways by the summary suspension of those who refuse to take a breath-analysis test upon arrest. First, the very existence of the summary sanction of the statute serves as a deterrent to drunken driving. Second, it provides strong inducement to take the breath-analysis test and thus effectuates the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings. Third, in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of public highways.

The summary and automatic character of the suspension sanction available under the statute is critical to attainment of these objectives. A presuspension hearing would substantially undermine the state interest in public safety by giving drivers significant incentive to refuse the breath-analysis test and demand a presuspension hearing as a dilatory tactic. Moreover, the incentive to delay arising from the availability of a presuspension hearing would generate a sharp increase in the number of hearings sought and therefore impose a substantial fiscal and administrative burden on the Commonwealth. *Dixon* v. *Love*, 431 U. S., at 114.

Nor is it any answer to the Commonwealth's interest in public safety that its interest could be served as well in other ways. The fact that the Commonwealth, for policy reasons of its own, elects not to summarily suspend those drivers who

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other injuries to persons and property. App. 31. More people were killed in alcohol-related traffic accidents in a year in this one State than were killed in the tragic DC–10 crash at O'Hare Airport in May 1979. Traffic deaths commonly exceed 50,000 annually in the United States, and approximately one-half of these fatalities are alcohol related. See U. S. Dept. of Transportation, 1977 Highway Safety Act Report App. A–9 (Table A–1); U. S. Dept. of Health, Education, and Welfare, Third Special Report on Alcohol and Health 61 (1978).

do take the breath-analysis test does not, as the District Court erroneously suggested, in any way undermine the Commonwealth's strong interest in summarily removing from the road those who refuse to take the test. A state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxication for use in subsequent proceedings. Indeed, in many cases, the test results could lead to prompt release of the driver with no charge being made on the "drunken driving" issue. And, in exercising its police powers, the Commonwealth is not required by the Due Process Clause to adopt an "all or nothing" approach to the acute safety hazards posed by drunken drivers.

We conclude, as we did in *Love*, that the compelling interest in highway safety justifies the Commonwealth in making a summary suspension effective pending the outcome of the prompt postsuspension hearing available.

Accordingly, the judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The question in this case, simply put, is whether a person who is subject to losing his driver's license for three months as a penalty for allegedly refusing a demand to take a breath-analysis test is constitutionally entitled to some sort of hearing before his license is taken away. In Massachusetts, such suspensions are effected by the Registrar of Motor Vehicles solely upon the strength of a policeman's affidavit recounting *his* version of an encounter between the police and the motorist. Mass. Gen. Laws Ann., ch. 90, § 24 (1)(f) (West Supp. 1979). The driver is afforded no opportunity, before this deprivation occurs, to present his side of the story in a forum

other than a police station. He is given no notice of any entitlement he might have to a "same day" hearing before the Registrar. The suspension penalty itself is concededly imposed not as an emergency measure to remove unsafe drivers from the roads, but as a sanction to induce drivers to submit to breath-analysis tests. In short, the critical fact that triggers the suspension is noncooperation with the police, not drunken driving. In my view, the most elemental principles of due process forbid a State from extracting this penalty without first affording the driver an opportunity to be heard.

A

Our decisions in *Bell* v. *Burson*, 402 U. S. 535, and *Dixon* v. *Love*, 431 U. S. 105, made clear that a person's interest in his driver's license is "property" that a State may not take away without satisfying the requirements of the due process guarantee of the Fourteenth Amendment. And the constitutional guarantee of procedural due process has always been understood to embody a presumptive requirement of notice and a meaningful opportunity to be heard *before* the State acts finally to deprive a person of his property. *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313; *Fuentes* v. *Shevin*, 407 U. S. 67, 82; *Boddie* v. *Connecticut*, 401 U. S. 371, 378; *Bell* v. *Burson*, *supra*, at 542; *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 16, 19.

This settled principle serves to ensure that the person threatened with loss has an opportunity to present his side of the story to a neutral decisionmaker "at a time when the deprivation can still be prevented." *Fuentes* v. *Shevin*, *supra*, at 81–82. It protects not simply against the risk of an erroneous decision. It also protects a "vulnerable citizenry from the overbearing concern for efficiency . . . that may characterize praiseworthy government officials no less . . . than mediocre ones." *Stanley* v. *Illinois*, 405 U. S. 645, 656. Cf. *Memphis Light, Gas & Water Div.* v. *Craft*, *supra*, at 21 n. 28. The very act of dealing with what purports to be

an "individual case" without first affording the person involved the protection of a hearing offends the concept of basic fairness that underlies the constitutional due process guarantee.

When a deprivation is irreversible—as is the case with a license suspension that can at best be shortened but cannot be undone—the requirement of some kind of hearing before a final deprivation takes effect is all the more important. Thus, in *Bell* v. *Burson*, the Court deemed it fundamental that "except in emergency situations" the State must afford a prior hearing before a driver's license termination becomes effective. 402 U. S., at 542.[1] In *Bell*, the State did provide a presuspension administrative hearing, but the Court held that the State could not, while purporting to condition a suspension in part on fault, exclude the element of fault from consideration in that hearing. The dimensions of a prior hearing may, of course, vary depending upon the nature of the case, the interests affected, and the prompt availability of adequate postdeprivation procedures. *Boddie* v. *Connecticut, supra; Mathews* v. *Eldridge*, 424 U. S. 319, 334–335. But when adjudicative facts are involved, when no valid governmental interest would demonstrably be disserved by delay, and when full retroactive relief cannot be provided, an after-the-fact

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[1] Emergency situations have generally been defined as those in which swift action is necessary to protect public health, safety, revenue or the integrity of public institutions. See, *e. g.*, *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554 (emergency action during wartime); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (seizure of misbranded drugs); *North American Storage Co.* v. *Chicago*, 211 U. S. 306 (seizure of allegedly diseased poultry); *Phillips* v. *Commissioner*, 283 U. S. 589 (effective tax collection); *Fahey* v. *Mallonee*, 332 U. S. 245 (emergency bank management); cf. *Goss* v. *Lopez*, 419 U. S. 565, 582 (to protect a public institution from a continuing danger). See generally J. Freedman, Crisis and Legitimacy: The Administrative Process and American Government (1978); L. Tribe, American Constitutional Law § 10–14 (1978).

evidentiary hearing on a critical issue is not constitutionally sufficient. Compare *Mathews* v. *Eldridge, supra,* with *Bell* v. *Burson, supra.*

The case of *Dixon* v. *Love,* 431 U. S. 105, is not, as the Court seems to suggest, to the contrary. At issue in *Love* was a statute permitting the summary revocation of the license of a repeat traffic offender on the strength of a cumulative record of traffic convictions and suspensions. The Court in *Love* stressed that the appellee had not contested the factual basis for his license revocation and had not contested the procedures followed in securing his previous convictions. Instead, the *Love* appellee had merely asserted a right to appear in person in advance to ask for leniency. *Id.,* at 114. Under these circumstances, the Court held that summary suspension was permissible, for the "appellee had the opportunity for a *full judicial hearing* in connection with each of the traffic convictions on which the . . . decision was based." *Id.,* at 113 (emphasis added). *Love,* then, involved an instance in which a revocation followed virtually automatically from the fact of duly obtained convictions for a stated number of traffic offenses. It established no broad exception to the normal presumption in favor of a prior hearing. See *Memphis Light, Gas & Water Div.* v. *Craft, supra,* at 19 n. 24.

B

The Court likens this driver's license suspension to the revocation at issue in *Love,* but in my view that analogy simply cannot be drawn. The Massachusetts breath-analysis suspension statute, in clear contrast to the *Love* statute, affords the driver no prior hearing of any kind to contest the critical factual allegations upon which the suspension is based. Those allegations can hardly be equated with routinely kept records of serious traffic offense *convictions.*

A breath-analysis suspension is premised upon three factors:

reasonable grounds for an arrest for driving while intoxicated; a proper request by the officer that the driver submit to a breath-analysis test; and a refusal to do so by the driver. Mass. Gen. Laws Ann., ch. 90, § 24 (1)(f) (West Supp. 1979). The appellee in this case was indeed arrested, after a collision in which his car was struck in the rear by a motorcycle, for driving while intoxicated. Moreover, he admitted that he initially refused to take a breath-analysis test. But he consistently contended that he was not informed of the sanction, as is required by § 24 (1)(f), and he vigorously disputed the accuracy of the police affidavit that said he was so informed. His further claim—that he requested a test as soon as he learned by inadvertence of the sanction, and that the police then refused to administer the test—was apparently accepted by the Massachusetts judge who subsequently dismissed the drunken-driving charge against him. Thus, there was clearly a significant factual dispute in this case.

That dispute, as in *Bell* v. *Burson*, concerned a critical element of the statutory basis for a suspension—in this instance whether there was indeed a refusal to take a breath-analysis test after a proper demand. The Court suggests nonetheless that the "fact" of an informed refusal, as well as the other statutory factual bases for a suspension, is somehow so routine, objective, and reliable as to be equivalent to routinely maintained official records of criminal convictions. I find this equation highly dubious. Initial deprivations of liberty based upon *ex parte* probable-cause determinations by the police are, of course, not unusual, *Gerstein* v. *Pugh*, 420 U. S. 103; *ex parte* probable-cause determinations by neutral magistrates relying upon properly corroborated police affidavits to determine whether arrest or search warrants should issue are likewise commonly made. *E. g., Aguilar* v. *Texas*, 378 U. S. 108. But these practices, to the extent that they permit *ex parte* deprivations of liberty or property, are clearly necessitated by the exigencies of law enforcement. They supply no support

for the proposition that a police affidavit can provide a constitutionally sufficient basis for the deprivation of property in a civil proceeding, when there is ample time to give the owner an opportunity to be heard in an impartial forum before an impartial decisionmaker.

Moreover, there is a vast difference between the record of duly adjudicated convictions at issue in *Love* and the historical facts of the encounter between the police and a motorist that form the basis for the driver's license suspension in the present case. To be sure, these relatively uncomplicated facts are unquestionably within "the personal knowledge of the reporting officer." *Ante*, at 14. But they are also within the knowledge of the driver. This Court has yet to hold that the police version of a disputed encounter between the police and a private citizen is inevitably accurate and reliable.[2]

I am not persuaded that the relative infrequency with which a driver may be able successfully to show that he did not refuse to take a breath-analysis test should excuse the State from the constitutional need to afford a prior hearing to any person who wishes to make such a challenge. The question whether or not there was such a refusal is one classically subject to adjudicative factfinding, and one that plainly involves issues of credibility and veracity. *Mathews* v. *Eldridge*, 424 U. S., at 343–344. The driver's "opportunity to tell his side of the story" to "the arresting officer," *ante*, at 14, surely

[2] Contrary to the Court's suggestion, the case of *Mathews* v. *Eldridge*, 424 U. S. 319, provides no precedential support for the *ex parte* suspension procedure followed by Massachusetts. The disability-benefit termination procedures upheld in *Mathews* did not involve an *"ex parte"* deprivation of property. To the contrary, the Court in *Mathews* stressed that the recipient had been afforded an opportunity to make extensive written submissions to the decisionmaker before any initial termination decision was made. *Id.*, at 344, 345. Given the amenability of the critical issue to written presentation and the clear availability of a prompt post-termination evidentiary hearing, this prior opportunity to be heard—albeit in writing—was deemed constitutionally sufficient.

cannot seriously be deemed a "meaningful opportunity to be heard" in the due process sense. There is simply no escaping the fact that the *first* hearing Massachusetts supplies on a breath-analysis suspension comes *after* the license of the driver has been taken away. And it is clear that the suspension itself effects a final deprivation of property that no subsequent proceeding can restore. Cf. *Mathews* v. *Eldridge*, *supra*, at 340.[3]

The State has urged, and the Court seems to agree, *ante*, at 17–19, that summary procedures are nevertheless required to further the State's interest in protecting the public from unsafe drivers. It cannot be doubted that the interest in "removing drunken drivers from the road" is significant. But the precedents supporting *ex parte* action have not turned simply on the significance of the governmental interest asserted. To the contrary, they have relied upon the extent to which that interest will be frustrated by the delay necessitated by a prior hearing. *E. g.*, *North American Storage Co.* v. *Chicago*, 211 U. S. 306 (allegedly spoiled food), and cases

[3] The Court stresses that a presuspension evidentiary hearing would be futile since the Registrar has no discretion to stay a suspension pending that hearing. The Court also emphasizes that the decision not to give the Registrar such discretion reflects a "rational" legislative choice. *Ante*, at 16–17. I fail to see how these observations answer the procedural due process claim in this case. The choice that the Massachusetts Legislature has made is merely a part of its decision to dispense with a presuspension hearing that is here under constitutional challenge. To be sure, that choice might well be "rational" in the equal protection sense. But the "rationality" of a legislative decision to dispense with the procedural safeguards that constitutionally must precede state deprivation of a person's interest has never been deemed controlling. The Court may, of course, be suggesting that the legislature has established a presumption that a driver who refuses a breath-analysis test is *per se* an unsafe driver. But the State has not made this argument, and indeed it would be a strange one in the context of this statute. For the state law expressly provides that an alleged refusal to take a breath-analysis test is not admissible as evidence in a prosecution for driving while intoxicated. Mass. Gen. Laws Ann., ch. 90, § 24 (1)(e) (West Supp. 1979).

cited in n. 1, *supra*. The breath-analysis test is plainly not designed to remove an irresponsible driver from the road as swiftly as possible. For if a motorist *submits* to the test and fails it, he keeps his driver's license—a result wholly at odds with any notion that summary suspension upon refusal to take the test serves an emergency protective purpose. A suspension for refusal to take the test is obviously premised not on intoxication, but on noncooperation with the police.

The State's basic justification for its summary suspension scheme, as the Court recognizes, *ante*, at 18, lies in the unremarkable idea that a prior hearing might give drivers a significant incentive to refuse to take the test. Related to this argument is the suggestion that the availability of a prior hearing might encourage a driver to demand such a hearing as a "dilatory" tactic, and thus might increase administrative costs by generating a "sharp increase in the number of hearings." *Ibid.* In sum, the State defends the *ex parte* suspension as essential to enlist the cooperation of drivers and also as a cost-saving device. I cannot accept either argument.

The 3-month driver's license suspension alone is obviously sufficient to promote the widespread use of the breath-analysis test, if drivers are informed not only of this sanction for a refusal but also realize that cooperation may conclude the entire case in their favor. Moreover, as is generally the case when a person's ability to protect his interests will ultimately depend upon a swearing contest with a law enforcement officer, the deck is already stacked heavily against the motorist under this statute. This point will not be lost upon the motorist. The State's position boils down to the thesis that the failure to afford an opportunity for a prior hearing can itself be part of the stacked deck. But there is no room for this type of argument in our constitutional system. A State is simply not free to manipulate Fourteenth Amendment procedural rights to coerce a person into compliance with its substantive rules, however important it may

consider those rules to be. The argument that a prior hearing might encourage "dilatory" tactics on the part of the motorist, true as it might be to human nature, is likewise wholly inconsistent with the simple Fourteenth Amendment guarantee that every "person" is entitled to be heard, before he may be deprived of his property by the State. Finally, the all too familiar cost-saving arguments raised by the State have regularly been made here and have as regularly been rejected as a justification for dispensing with the guarantees of the Fourteenth Amendment. For if costs were the criterion, the basic procedural protections of the Fourteenth Amendment could be read out of the Constitution. Happily, the Constitution recognizes higher values than "speed and efficiency." *Stanley* v. *Illinois*, 405 U. S., at 656.

C

The Court's holding that the Massachusetts breath-analysis suspension scheme satisfies the Constitution seems to be premised in large part on the assumption that a prompt post-suspension hearing is available. But even assuming that such an after-the-fact procedure would be constitutionally sufficient in this situation, the so-called "prompt postsuspension" remedy afforded by Massachusetts is, so far as I can tell, largely fictional. First, the State does not notify the driver of the availability of any such remedy.[4] And without notice, the remedy, even if it exists, is hardly a meaningful safeguard. Only last Term we reaffirmed that "reasonable" notice of a

[4] To be sure, the statute states that a driver is entitled to a limited hearing before the Registrar, see Mass. Gen. Laws Ann., ch. 90, § 24 (1)(g) (West 1969), and the parties have stipulated that under Massachusetts practice the driver may schedule this hearing by "walking in" to a Registry Office. The only postdeprivation remedy mentioned in the suspension notice sent to the driver, however, is a right to take "an appeal" within 10 days to the Board of Appeal on Motor Vehicle Liability. The unexplained reason for the appellee's failure to exercise his right to the putative "walk-in" hearing, *ante*, at 7–8, thus may lie in the failure of the State to notify him of any such right.

procedural right is itself integral to due process. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S., at 13–15. This inherent principle has long been established, see *Mullane* v. *Central Hanover Trust Co.*, 339 U. S., at 314, and Massachusetts clearly has not honored it.

Quite apart from the failure of Massachusetts to inform the driver of any entitlement to a "walk-in" hearing, that remedy cannot—as the Court recognizes—provide immediate relief to the driver who contests the police report of his refusal to take a test. To resolve such a factual dispute, a "meaningful hearing" before an impartial decisionmaker would require the presence of the officer who filed the report, the attesting officer, and any witnesses the driver might wish to call. But the State has provided no mechanism for scheduling any such immediate postsuspension evidentiary hearing.[5] The fact is that the "walk-in" procedure provides little more than a right to request the scheduling of a later hearing. In the meantime, the license suspension continues, for the Registrar is without statutory power to stay a suspension founded upon a technically correct affidavit pending the outcome of an evidentiary hearing.

Finally, the Registrar—according to the Court's own description of the Massachusetts scheme—quite possibly does not have authority to resolve even the most basic questions that might be raised about the validity of a breath-analysis suspension. *Ante*, at 15 n. 8. And, if the Registrar has no final authority to resolve the "legal" question the Court perceives in this case,[6] it can hardly be concluded that there

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[5] An obvious mechanism is suggested by the procedures generally followed for routine traffic offenses. The driver is immediately notified by summons of his right to request a judicial hearing. If a request is made, a date is set, the driver and the police are notified, and the question of liability is then resolved in a single proceeding.

[6] The legal question identified by the Court is whether a delayed offer to cooperate on the driver's part should excuse the suspension penalty. In this case, that question presumably would not arise if the delay had in fact

exists the prompt postsuspension relief that is said to excuse the State from any need to provide a prior hearing. For, if a prompt postsuspension hearing is even to be eligible for consideration as minimally adequate to satisfy the demands of procedural due process, it must provide for an impartial decisionmaker with authority to resolve the basic dispute and to provide prompt relief. See *Memphis Light, Gas & Water Div.* v. *Craft, supra,* at 18.[7]

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been attributable to the failure on the part of the police to comply with the statutory requirement that the driver be informed of the sanction. If, as the appellee has claimed, this is what happened, the question would be whether a refusal after an improper demand is legally sufficient to justify a suspension.

[7] Indeed, under the Court's description of the postsuspension relief available under the statute, it appears that the appellee was by no means "assured a prompt proceeding *and a prompt disposition of the outstanding issues between* [*him*] *and the State.*" *Barry* v. *Barchi, post,* at 66 (emphasis added). This precise constitutional infirmity has led the Court in *Barry* v. *Barchi* to sustain the Fourteenth Amendment claim of a horse trainer whose trainer's racing license was summarily suspended upon a probable-cause showing that his horse was drugged before a race. Here, as in *Barchi,* the appellee was not notified of any right to prompt postsuspension relief. Here, as in *Barchi,* the hearing available upon "appeal" from the administrative summary suspension, see Mass. Gen. Laws Ann., ch. 90, § 28 (West 1969), appears to be the only meaningful postsuspension evidentiary hearing afforded. As in *Barchi,* the statute involved here does not specify when this review must begin, does not require that the suspension be stayed during review, and does not require the Board of Appeal to reach a prompt decision. Further, in view of the Registrar's apparent lack of authority to make any definitive determination of the issues in any evidentiary hearing that the driver might schedule by "walking in," there seems to be no "assurance" under this statute that the driver will receive prompt postsuspension relief from a "trial level" hearing examiner. In sum, under the principle established in *Barchi,* the District Court upon remand for consideration of this appellee's "as applied" challenge to his suspension, *ante,* at 10 n. 6, will be required to sustain that challenge, unless the courts find that the appellee was in fact given advance notice of his right to an immediate postsuspension hearing and was "assured" under the statute of an immediate and definitive resolution of the contested issues in his case.

D

The Court has never subscribed to the general view "that a wrong may be done if it can be undone," *Stanley* v. *Illinois*, 405 U. S., at 647. We should, in my opinion, be even less enchanted by the proposition that due process is satisfied by delay when the wrong cannot be undone at all, but at most can be limited in duration. Even a day's loss of a driver's license can inflict grave injury upon a person who depends upon an automobile for continued employment in his job.

I do not mean to minimize the importance of breath-analysis testing as part of a state effort to identify, prosecute, and rehabilitate the alcohol-ridden motorist. I cannot, however, agree that the summary suspension of a driver's license authorized by this Massachusetts law is a constitutionally permissible method to further those objectives. For, on the sole basis of a policeman's affidavit, the license is summarily suspended, and it is suspended not for drunken driving but only for failure to cooperate with the police. The State—in my view—has totally failed to demonstrate that this summary suspension falls within any recognized exception to the established protections of the Fourteenth Amendment. Accordingly, I respectfully dissent.

MICHIGAN *v.* DEFILLIPPO

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 77-1680. Argued February 21, 1979—Decided June 25, 1979

At 10 o'clock at night, Detroit police officers found respondent in an alley with a woman who was in the process of lowering her slacks. When asked for identification, respondent gave inconsistent and evasive responses. He was then arrested for violation of a Detroit ordinance, which provides that a police officer may stop and question an individual if he has reasonable cause to believe that the individual's "behavior . . . warrants further investigation" for criminal activity, and further provides that it is unlawful for any person so stopped to refuse to identify himself and produce evidence of his identity. In a search which followed, the officers discovered drugs on respondent's person, and he was charged with a drug offense but not with violation of the ordinance. The trial court denied his motion to suppress the evidence obtained in the search. The Michigan Court of Appeals reversed, holding that the Detroit ordinance was unconstitutionally vague, that both the arrest and search were invalid because respondent had been arrested pursuant to that ordinance, and that the evidence obtained in the search should have been suppressed on federal constitutional grounds even though it was obtained as a result of an arrest pursuant to a presumptively valid ordinance.

Held: Respondent's arrest, made in good-faith reliance on the Detroit ordinance, which at the time had not been declared unconstitutional, was valid regardless of the subsequent judicial determination of its unconstitutionality, and therefore the drugs obtained in the search should not have been suppressed. Pp. 35-40.

(a) Under the Fourth and Fourteenth Amendments, an arresting officer may, without a warrant, search a person validly arrested. The fact of a lawful arrest, standing alone, authorizes a search. Pp. 35-36.

(b) The Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense. Here, the arresting officer had abundant probable cause to believe that respondent's conduct violated the ordinance: respondent's presence with a woman in the circumstances described clearly was "behavior warrant[ing] further investigation"

under the ordinance, and respondent's responses to the request for identification constituted a refusal to identify himself as the ordinance required. Pp. 36–37.

(c) Under these circumstances, the arresting officer did not lack probable cause simply because he should have known the ordinance was invalid and would be judicially declared unconstitutional. A prudent officer, in the course of determining whether respondent had committed an offense under such circumstances, should not have been required to anticipate that a court would later hold the ordinance unconstitutional. Pp. 37–38.

(d) Since the arrest under the presumptively valid ordinance was valid, the search which followed was valid because it was incidental to that arrest. *Torres* v. *Puerto Rico*, 442 U. S. 465; *Almeida-Sanchez* v. *United States*, 413 U. S. 266; *Sibron* v. *New York*, 392 U. S. 40; and *Berger* v. *New York*, 388 U. S. 41, distinguished. Pp. 39–40.

80 Mich. App. 197, 262 N. W. 2d 921, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 40. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 41.

Timothy A. Baughman argued the cause for petitioner. With him on the briefs was *William L. Cahalan.*

James C. Howarth, by appointment of the Court, 439 U. S. 976, argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed by *Frank Carrington, Wayne W. Schmidt, Glen R. Murphy, Thomas Hendrickson, James P. Costello,* and *Richard F. Mayer* for Americans for Effective Law Enforcement, Inc., et al.; and by *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Daniel J. Kremer*, Assistant Attorney General, and *Harley D. Mayfield* and *Karl Phaler*, Deputy Attorneys General, for the State of California.

Briefs of *amici curiae* urging affirmance were filed by *Edward M. Wise* for the American Civil Liberties Union Fund of Michigan; and by *John J. Cleary* for California Attorneys for Criminal Justice et al.

Laurance S. Smith filed a brief for the National Legal Aid and Defender Association as *amicus curiae.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this case is whether an arrest made in good-faith reliance on an ordinance, which at the time had not been declared unconstitutional, is valid regardless of a subsequent judicial determination of its unconstitutionality.

I

At approximately 10 p. m. on September 14, 1976, Detroit police officers on duty in a patrol car received a radio call to investigate two persons reportedly appearing to be intoxicated in an alley. When they arrived at the alley, they found respondent and a young woman. The woman was in the process of lowering her slacks. One of the officers asked what they were doing, and the woman replied that she was about to relieve herself. The officer then asked respondent for identification; respondent asserted that he was Sergeant Mash, of the Detroit Police Department; he also purported to give his badge number, but the officer was unable to hear it. When respondent again was asked for identification, he changed his answer and said either that he worked for or that he knew Sergeant Mash. Respondent did not appear to be intoxicated.

Section 39–1–52.3 of the Code of the City of Detroit provides that a police officer may stop and question an individual if he has reasonable cause to believe that the individual's behavior warrants further investigation for criminal activity. In 1976 the Detroit Common Council amended § 39–1–52.3 to provide that it should be unlawful for any person stopped pursuant thereto to refuse to identify himself and produce evidence of his identity.[1]

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[1] As amended, Code of the City of Detroit § 39–1–52.3 provided:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the

When he failed to identify himself, respondent was taken into custody for violation of § 39–1–52.3;[2] he was searched by one of the officers who found a package of marihuana in one of respondent's shirt pockets, and a tinfoil packet secreted inside a cigarette package in the other. The tinfoil packet subsequently was opened at the station; an analysis established that it contained phencyclidine, another controlled substance.

Respondent was charged with possession of the controlled substance phencyclidine. At the preliminary examination, he moved to suppress the evidence obtained in the search following the arrest; the trial court denied the motion. The Michigan Court of Appeals allowed an interlocutory appeal and reversed. It held that the Detroit ordinance, § 39–1–52.3, was unconstitutionally vague and concluded that since respondent had been arrested pursuant to that ordinance, both the arrest and the search were invalid.

The court expressly rejected the contention that an arrest made in good-faith reliance on a presumptively valid ordinance is valid regardless of whether the ordinance subsequently is declared unconstitutional. Accordingly, the Michigan Court of Appeals remanded with instructions to suppress the evi-

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officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity."

While holding the ordinance unconstitutional, the Michigan Court of Appeals construed the ordinance to make refusal to identify oneself a crime meriting arrest. 80 Mich. App. 197, 201 n. 1, 262 N. W. 2d 921, 923 n. 1 (1977).

The preamble to the amendment indicates that it was enacted in response to an emergency caused by a marked increase in crime, particularly street crime by gangs of juveniles.

[2] The woman was arrested on a charge of disorderly conduct; she is not involved in this case.

dence and quash the information. 80 Mich. App. 197, 262 N. W. 2d 921 (1977).

The Michigan Supreme Court denied leave to appeal. We granted certiorari, 439 U. S. 816 (1978), to review the Michigan court's holding that evidence should be suppressed on federal constitutional grounds, although it was obtained as a result of an arrest pursuant to a presumptively valid ordinance. That holding was contrary to the holdings of the United States Court of Appeals for the Fifth Circuit that such arrests are valid. See *United States* v. *Carden*, 529 F. 2d 443 (1976); *United States* v. *Kilgen*, 445 F. 2d 287 (1971).

II

Respondent was not charged with or tried for violation of the Detroit ordinance. The State contends that because of the violation of the ordinance, *i. e.*, refusal to identify himself, which respondent committed in the presence of the officers, respondent was subject to a valid arrest. The search that followed being incidental to that arrest, the State argues that it was equally valid and the drugs found should not have been suppressed. Respondent contends that since the ordinance which he was arrested for violating has been found unconstitutionally vague on its face, the arrest and search were invalid as violative of his rights under the Fourth and Fourteenth Amendments. Accordingly, he contends the drugs found in the search were correctly suppressed.

Under the Fourth and Fourteenth Amendments, an arresting officer may, without a warrant, search a person validly arrested. *United States* v. *Robinson*, 414 U. S. 218 (1973); *Gustafson* v. *Florida*, 414 U. S. 260 (1973). The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search. *United States* v. *Robinson*, *supra*, at 235. Here the officer effected the arrest of respond-

ent for his refusal to identify himself; contraband drugs were found as a result of the search of respondent's person incidental to that arrest. If the arrest was valid when made, the search was valid and the illegal drugs are admissible in evidence.

Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law. *Ker* v. *California*, 374 U. S. 23, 37 (1963); *Johnson* v. *United States*, 333 U. S. 10, 15, and n. 5 (1948). Respondent does not contend, however, that the arrest was not authorized by Michigan law. See Mich. Comp. Laws § 764.15 (1970). His sole contention is that since the arrest was for allegedly violating a Detroit ordinance later held unconstitutional, the search was likewise invalid.

III

It is not disputed that the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense. *Adams* v. *Williams*, 407 U. S. 143, 148–149 (1972); *Beck* v. *Ohio*, 379 U. S. 89, 91 (1964). The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest. We have made clear that the kinds and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest. See *Gerstein* v. *Pugh*, 420 U. S. 103, 119–123 (1975); *Brinegar* v. *United States*, 338 U. S. 160, 174–176 (1949).

When the officer arrested respondent, he had abundant probable cause to believe that respondent's conduct violated the terms of the ordinance. The ordinance provides that a person commits an offense if (a) an officer has reasonable cause to believe that given behavior warrants further investigation, (b) the officer stops him, and (c) the suspect refuses to identify himself. The offense is then complete.

Respondent's presence with a woman, in the circumstances described, in an alley at 10 p. m. was clearly, in the words of the ordinance, "behavior . . . warrant[ing] further investigation." Respondent's inconsistent and evasive responses to the officer's request that he identify himself, stating first that he was Sergeant Mash of the Detroit Police Department and then that he worked for or knew Sergeant Mash, constituted a refusal by respondent to identify himself as the ordinance required. Assuming, *arguendo,* that a person may not constitutionally be required to answer questions put by an officer in some circumstances, the false identification violated the plain language of the Detroit ordinance.

The remaining question, then, is whether, in these circumstances, it can be said that the officer lacked probable cause to believe that the conduct he observed and the words spoken constituted a violation of law simply because he should have known the ordinance was invalid and would be judicially declared unconstitutional. The answer is clearly negative.

This Court repeatedly has explained that "probable cause" to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. See *Gerstein* v. *Pugh, supra,* at 111; *Adams* v. *Williams, supra,* at 148; *Beck* v. *Ohio, supra,* at 91; *Draper* v. *United States,* 358 U. S. 307, 313 (1959); *Brinegar* v. *United States, supra,* at 175–176; *Carroll* v. *United States,* 267 U. S. 132, 162 (1925).

On this record there was abundant probable cause to satisfy the constitutional prerequisite for an arrest. At that time, of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown

by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

In *Pierson* v. *Ray*, 386 U. S. 547 (1967), persons who had been arrested for violating a statute later declared unconstitutional by this Court sought damages for false arrest under state law and for violation of the Fourteenth Amendment under 42 U. S. C. § 1983. Mr. Chief Justice Warren speaking for the Court, in holding that police action based on a presumptively valid law was subject to a valid defense of good faith, observed: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." 386 U. S., at 555. The Court held that "the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Id.*, at 557. Here, the police were not required to risk "being charged with dereliction of duty if [they did] not arrest when [they had] probable cause" on the basis of the conduct observed.[3]

[3] The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

IV

We have held that the exclusionary rule required suppression of evidence obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause and without a valid warrant. See, *e. g.*, *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Sibron* v. *New York*, 392 U. S. 40 (1968); *Berger* v. *New York*, 388 U. S. 41 (1967). Our holding today is not inconsistent with these decisions; the statutes involved in those cases bore a different relationship to the challenged searches than did the Detroit ordinance to respondent's arrest and search.

Those decisions involved statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment. For example, in *Almeida-Sanchez* v. *United States*, *supra*, we held invalid a search pursuant to a federal statute which authorized the Border Patrol to search any vehicle within a "reasonable distance" of the border, without a warrant or probable cause. The Attorney General, by regulation, fixed 100 miles as a "reasonable distance" from the border. 413 U. S., at 268. We held a search so distant from the point of entry was unreasonable under the Constitution. In *Berger* v. *New York* we struck down a statute authorizing searches under warrants which did not "particularly describ[e] the place to be searched, and the persons or things to be seized," as required by the Fourth and Fourteenth Amendments. 388 U. S., at 55–56.

In contrast, the ordinance here declared it a misdemeanor for one stopped for "investigation" to "refuse to identify himself"; it did not directly authorize the arrest or search.[4] Once

[4] In terms of the ordinance, § 39–1–52.3 authorizes officers to detain an individual who is "unable to provide reasonable evidence of his true identity." However, the State disclaims reliance on this provision to

respondent refused to identify himself as the presumptively valid ordinance required, the officer had probable cause to believe respondent was committing an offense in his presence, and Michigan's general arrest statute, Mich. Comp. Laws § 764.15 (1970), authorized the arrest of respondent, independent of the ordinance. The search which followed was valid because it was incidental to that arrest. The ordinance is relevant to the validity of the arrest and search only as it pertains to the "facts and circumstances" we hold constituted probable cause for arrest.

The subsequently determined invalidity of the Detroit ordinance on vagueness grounds does not undermine the validity of the arrest made for violation of that ordinance, and the evidence discovered in the search of respondent should not have been suppressed. Accordingly, the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but add a few words about the concern so evident in MR. JUSTICE BRENNAN's dissenting opinion that today's decision will allow States and municipalities to circumvent the probable-cause requirement of the Fourth Amendment. There is some danger, I acknowledge, that the police will use a stop-and-identify ordinance to arrest persons for improper identification; that they will then conduct a search pursuant to the arrest; that if they discover contraband or other evidence of crime, the arrestee will be charged with some other offense; and that if they do not discover contraband or other evidence of crime, the arrestee will be released. In this manner, if the arrest for violation of the stop-

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authorize the arrest of a person who, like respondent, "refuse[s] to identify himself." Tr. of Oral Arg. 5.

and-identify ordinance is not open to challenge, the ordinance itself could perpetually evade constitutional review.

There is no evidence in this case, however, that the Detroit ordinance is being used in such a pretextual manner. See Tr. of Oral Arg. 8. If a defendant in a proper case showed that the police habitually arrest, but do not prosecute, under a stop-and-identify ordinance, then I think this would suffice to rebut any claim that the police were acting in reasonable, good-faith reliance on the constitutionality of the ordinance. The arrestee could then challenge the validity of the ordinance, and, if the court concluded it was unconstitutional, could have the evidence obtained in the search incident to the arrest suppressed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, dissenting.

I disagree with the Court's conclusion that the Detroit police had constitutional authority to arrest and search respondent because respondent refused to identify himself in violation of the Detroit ordinance. In my view, the police conduct, whether or not authorized by state law, exceeded the bounds set by the Constitution and violated respondent's Fourth Amendment rights.

At the time of respondent's arrest, Detroit City Code § 39–1–52.3 (1976) read as follows:

> "When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity."

Detroit police, acting purely on suspicion, stopped respondent Gary DeFillippo on the authority of this ordinance and demanded that he identify himself and furnish proof of his identity. When respondent rebuffed their inquiries the police arrested him for violation of the ordinance. Thereafter, police searched respondent and discovered drugs.

Respondent challenges the constitutionality of the ordinance and his arrest and search pursuant to it. The Court assumes the unconstitutionality of the ordinance but upholds respondent's arrest nonetheless. The Court reasons that the police had probable cause to believe that respondent's actions violated the ordinance, that the police could not have been expected to know that the ordinance was unconstitutional, and that the police actions were therefore reasonable.

The Court errs, in my view, in focusing on the good faith of the arresting officers and on whether they were entitled to rely upon the validity of the Detroit ordinance. For the dispute in this case is not between the arresting officers and respondent. Cf. *Pierson* v. *Ray*, 386 U. S. 547 (1967).[1] The dispute is between respondent and the State of Michigan.

[1] The Court's reliance upon *Pierson* v. *Ray*, 386 U. S., at 555, exposes the fallacy of its constitutional analysis. The Court assumes that respondent had a constitutional right to refuse to answer the questions put to him by the police, see *ante*, at 37, but nonetheless, relying upon *Pierson* v. *Ray*, upholds respondent's arrest and search for exercising this constitutional right. But *Pierson* involved an action for damages against individual police officers and held only that it would be unfair to penalize those officers for actions undertaken in a good-faith, though mistaken, interpretation of the Constitution. Since the officer who arrested respondent in this case is not being mulcted for damages or penalized in any way for his actions, *Pierson* does not support the Court's position. Rather, since respondent is the one who is being penalized for the exercise of what he reasonably believed to be his constitutional rights, *Pierson* counsels for invalidation of respondent's arrest and not for its validation. For if it is unfair to penalize a police officer for actions undertaken pursuant to a good-faith, though mistaken, interpretation of the Constitution, then surely it is unfair to penalize respondent for actions undertaken pursuant to a good-faith and *correct* interpretation of the Constitution.

The ultimate issue is whether the State gathered evidence against respondent through unconstitutional means. Since the State is responsible for the actions of its legislative bodies as well as for the actions of its police, the State can hardly defend against this charge of unconstitutional conduct by arguing that the constitutional defect was the product of legislative action and that the police were merely executing the laws in good faith. See *Torres* v. *Puerto Rico*, 442 U. S. 465 (1979); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Berger* v. *New York*, 388 U. S. 41 (1967). States "may not . . . authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure 'is not whether the search [or seizure] was authorized by state law. The question is rather whether the search [or seizure] was reasonable under the Fourth Amendment.'" *Sibron* v. *New York*, 392 U. S. 40, 61 (1968), quoting in part from *Cooper* v. *California*, 386 U. S. 58, 61 (1967).

If the Court's inquiry were so directed and had not asked whether the arresting officers faithfully applied state law, invalidation of respondent's arrest and search would have been inescapable. For the Court's assumption that the Detroit ordinance is unconstitutional is well founded; the ordinance is indeed unconstitutional and patently so. And if the reasons for that constitutional infirmity had only been explored, rather than simply assumed, it would have been obvious that the application of the ordinance to respondent by Detroit police in this case trenched upon respondent's Fourth Amendment rights and resulted in an unreasonable search and seizure.

The touchstone of the Fourth Amendment's protection of privacy interests and prohibition against unreasonable police searches and seizures is the requirement that such police intrusions be based upon probable cause—"'the best compromise that has been found for accommodating [the] often

opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" *Dunaway* v. *New York*, 442 U. S. 200, 208 (1979), quoting from *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949).

Because of this requirement and the constitutional policies underlying it, the authority of police to accost citizens on the basis of suspicion is "narrowly drawn," *Terry* v. *Ohio*, 392 U. S. 1, 27 (1968), and carefully circumscribed. See *Dunaway* v. *New York*, *supra*. Police may not conduct searches when acting on less than probable cause. Even weapons frisks in these circumstances are permissible only if the police have reason to believe that they are dealing with an armed and dangerous individual. See *Terry* v. *Ohio*, *supra*, at 24. Furthermore, while a person may be briefly detained against his will on the basis of reasonable suspicion "while pertinent questions are directed to him . . . the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . ." *Terry* v. *Ohio*, *supra*, at 34 (WHITE, J., concurring). In the context of criminal investigation, the privacy interest in remaining silent simply cannot be overcome at the whim of any suspicious police officer.[2] "[W]hile the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to an-

[2] In addition to the Fourth Amendment, see *Katz* v. *United States*, 389 U. S. 347 (1967), the right to remain silent when detained by police on the basis of suspicion may find its source in the Fifth Amendment's privilege against self-incrimination, see *Haynes* v. *United States*, 390 U. S. 85 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968); *Albertson* v. *SACB*, 382 U. S. 70 (1965), or, more generally, in "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting). See also *Griswold* v. *Connecticut*, 381 U. S. 479, 494 (1965) (Goldberg, J., concurring).

swer." *Davis* v. *Mississippi,* 394 U. S. 721, 727 n. 6 (1969).

In sum then, individuals accosted by police on the basis merely of reasonable suspicion have a right not to be searched, a right to remain silent, and, as a corollary, a right not to be searched if they choose to remain silent.

It is plain that the Detroit ordinance and the police conduct that it purports to authorize abridge these rights and their concomitant limitations upon police authority. The ordinance authorizes police, acting on the basis of suspicion, to demand answers from suspects and authorizes arrest, search, and conviction for those who refuse to comply. The ordinance therefore commands that which the Constitution denies the State power to command and makes "a crime out of what under the Constitution cannot be a crime." *Coates* v. *Cincinnati,* 402 U. S. 611, 616 (1971). Furthermore, the ordinance, by means of a transparent expedient—making the constitutionally protected refusal to answer itself a substantive offense—sanctions circumvention by the police of the Court's holding that refusal to answer police inquiries during a *Terry* stop furnishes no basis for a full-scale search and seizure. Clearly, this is a sheer piece of legislative legerdemain not to be countenanced. See *Davis* v. *Mississippi, supra,* at 726–727; *Sibron* v. *New York, supra.*

The Court does not dispute this analysis. Rather, it assumes that respondent had a constitutional right to refuse to cooperate with the police inquiries, that the ordinance is unconstitutional, and that henceforward the ordinance shall be regarded as null and void. Yet, the Court holds that arrests and searches pursuant to the ordinance prior to its invalidation by the Michigan Court of Appeals are constitutionally valid. Given the Court's assumptions concerning the invalidity of the ordinance, its conclusion must rest on the tacit assumption that the defects requiring invalidation of the ordinance and of convictions entered pursuant to it do not also require the invalidation of arrests pursuant to the ordinance. But only a brief reflection upon the pervasiveness of the ordi-

nance's constitutional infirmities demonstrates the fallacy of that assumption.

A major constitutional defect of the ordinance is that it forces individuals accosted by police solely on the basis of suspicion to choose between forgoing their right to remain silent and forgoing their right not to be searched if they choose to remain silent. Clearly, a constitutional prohibition merely against prosecutions under the ordinance and not against arrests under the ordinance as well would not solve this dilemma. For the fact would remain that individuals who chose to remain silent would be forced to relinquish their right not to be searched (and indeed would risk conviction on the basis of any evidence seized from them), while those who chose not to be searched would be forced to forgo their constitutional right to remain silent. This Hobson's choice can be avoided only by invalidating such police intrusions whether or not authorized by ordinance and holding fast to the rule of *Terry* and its progeny: that police acting on less than probable cause may not search, compel answers, or search those who refuse to answer their questions.[3]

The conduct of Detroit police in this case plainly violated Fourth Amendment limitations. The police commanded respondent to relinquish his constitutional right to remain silent and then arrested and searched him when he refused to do so. The Detroit ordinance does not validate that constitutionally impermissible conduct. Accordingly, I would affirm the judgment of the Michigan Court of Appeals invalidating respondent's arrest and suppressing its fruits.

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[3] There is also the risk that if stop-and-identify ordinances cannot be challenged in collateral proceedings they may never be presented for judicial review. Jurisdictions so minded may avoid prosecuting under them and use them merely as investigative tools to gather evidence of other crimes through pretextual arrests and searches. The possibility of such evasion is yet another reason that demonstrates the constitutional error of the Court's approval of respondent's arrest.

BROWN *v.* TEXAS

APPEAL FROM THE COUNTY COURT AT LAW NO. 2, EL PASO COUNTY, TEXAS

No. 77-6673. Argued February 21, 1979—Decided June 25, 1979

Two police officers, while cruising near noon in a patrol car, observed appellant and another man walking away from one another in an alley in an area with a high incidence of drug traffic. They stopped and asked appellant to identify himself and explain what he was doing. One officer testified that he stopped appellant because the situation "looked suspicious and we had never seen that subject in that area before." The officers did not claim to suspect appellant of any specific misconduct, nor did they have any reason to believe that he was armed. When appellant refused to identify himself, he was arrested for violation of a Texas statute which makes it a criminal act for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information." Appellant's motion to set aside an information charging him with violation of the statute on the ground that the statute violated the First, Fourth, Fifth, and Fourteenth Amendments was denied, and he was convicted and fined.

Held: The application of the Texas statute to detain appellant and require him to identify himself violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe that appellant was engaged or had engaged in criminal conduct. Detaining appellant to require him to identify himself constituted a seizure of his person subject to the requirement of the Fourth Amendment that the seizure be "reasonable." Cf. *Terry* v. *Ohio*, 392 U. S. 1; *United States* v. *Brignoni-Ponce*, 422 U. S. 873. The Fourth Amendment requires that such a seizure be based on specific, objective facts indicating that society's legitimate interests require such action, or that the seizure be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse*, 440 U. S. 648. Here, the State does not contend that appellant was stopped pursuant to a practice embodying neutral criteria, and the officers' actions were not justified on the ground that they had a reasonable suspicion, based on objective facts, that he was involved in criminal activity. Absent any basis for suspecting appellant of misconduct, the balance between the public interest in crime prevention and appellant's right to personal

security and privacy tilts in favor of freedom from police interference. Pp. 50–53.

Reversed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Raymond C. Caballero argued the cause and filed a brief for appellant.

Renea Hicks, Assistant Attorney General of Texas, argued the cause for appellee *pro hac vice.* With him on the brief were *Mark White,* Attorney General, *John W. Fainter, Jr.,* First Assistant Attorney General, and *Ted L. Hartley,* Executive Assistant Attorney General.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This appeal presents the question whether appellant was validly convicted for refusing to comply with a policeman's demand that he identify himself pursuant to a provision of the Texas Penal Code which makes it a crime to refuse such identification on request.

I

At 12:45 in the afternoon of December 9, 1977, Officers Venegas and Sotelo of the El Paso Police Department were cruising in a patrol car. They observed appellant and another man walking in opposite directions away from one another in an alley. Although the two men were a few feet apart when they first were seen, Officer Venegas later testified that both officers believed the two had been together or were about to meet until the patrol car appeared.

The car entered the alley, and Officer Venegas got out and asked appellant to identify himself and explain what he was

**Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, *Daniel J. Kremer,* Assistant Attorney General, and *Karl Phaler,* Deputy Attorney General, filed a brief for the State of California as *amicus curiae.*

doing there. The other man was not questioned or detained. The officer testified that he stopped appellant because the situation "looked suspicious and we had never seen that subject in that area before." The area of El Paso where appellant was stopped has a high incidence of drug traffic. However, the officers did not claim to suspect appellant of any specific misconduct, nor did they have any reason to believe that he was armed.

Appellant refused to identify himself and angrily asserted that the officers had no right to stop him. Officer Venegas replied that he was in a "high drug problem area"; Officer Sotelo then "frisked" appellant, but found nothing.

When appellant continued to refuse to identify himself, he was arrested for violation of Tex. Penal Code Ann., Tit. 8, § 38.02 (a) (1974), which makes it a criminal act for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information."[1] Following the arrest the officers searched appellant; nothing untoward was found.

While being taken to the El Paso County Jail appellant identified himself. Nonetheless, he was held in custody and charged with violating § 38.02 (a). When he was booked he was routinely searched a third time. Appellant was convicted in the El Paso Municipal Court and fined $20 plus court costs for violation of § 38.02. He then exercised his right under Texas law to a trial *de novo* in the El Paso County Court. There, he moved to set aside the information on the ground that § 38.02 (a) of the Texas Penal Code violated the First, Fourth, and Fifth Amendments and was unconstitutionally vague in violation of the Fourteenth Amendment. The

[1] The entire section reads as follows:

"§ 38.02. Failure to Identify as Witness

"(a) A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."

motion was denied. Appellant waived a jury, and the court convicted him and imposed a fine of $45 plus court costs.

Under Texas law an appeal from an inferior court to a county court is subject to further review only if a fine exceeding $100 is imposed. Tex. Code Crim. Proc. Ann., Art. 4.03 (Vernon 1977). Accordingly, the County Court's rejection of appellant's constitutional claims was a decision "by the highest court of a State in which a decision could be had." 28 U. S. C. § 1257 (2). On appeal here we noted probable jurisdiction. 439 U. S. 909 (1978). We reverse.

II

When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment. In convicting appellant, the County Court necessarily found as a matter of fact that the officers "lawfully stopped" appellant. See Tex. Penal Code Ann., Tit. 8, § 38.02 (1974). The Fourth Amendment, of course, "applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis* v. *Mississippi,* 394 U. S. 721 (1969); *Terry* v. *Ohio,* 392 U. S. 1, 16–19 (1968). '[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person,' *id.,* at 16, and the Fourth Amendment requires that the seizure be 'reasonable.' " *United States* v. *Brignoni-Ponce,* 422 U. S. 873, 878 (1975).

The reasonableness of seizures that are less intrusive than a traditional arrest, see *Dunaway* v. *New York,* 442 U. S. 200, 209–210 (1979); *Terry* v. *Ohio,* 392 U. S. 1, 20 (1968), depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pennsylvania* v. *Mimms,* 434 U. S. 106, 109 (1977); *United States* v. *Brignoni-Ponce, supra,* at 878. Consideration of the constitutionality of such seizures involves a

weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. See, *e. g.*, 422 U. S., at 878–883.

A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware* v. *Prouse*, 440 U. S. 648, 654–655 (1979); *United States* v. *Brignoni-Ponce*, *supra*, at 882. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware* v. *Prouse*, *supra*, at 663. See *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 558–562 (1976).

The State does not contend that appellant was stopped pursuant to a practice embodying neutral criteria, but rather maintains that the officers were justified in stopping appellant because they had a "reasonable, articulable suspicion that a crime had just been, was being, or was about to be committed." We have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have "probable cause" to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. *United States* v. *Brignoni-Ponce*, *supra*, at 880–881. See *Terry* v. *Ohio*, *supra*, at 25–26. However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *Delaware* v. *Prouse*, *supra*, at 663; *United States* v. *Brignoni-Ponce*, *supra*, at 882–883; see also *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939),

The flaw in the State's case is that none of the circum-

stances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal conduct. Officer Venegas testified at appellant's trial that the situation in the alley "looked suspicious," but he was unable to point to any facts supporting that conclusion.[2] There is no indication in the record that it was unusual for people to be in the alley. The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. In short, the appellant's activity was no different from the activity of other pedestrians in that neighborhood. When pressed, Officer Venegas acknowledged that the only reason he stopped appellant was to ascertain his identity. The record suggests an understandable desire to assert a police presence; however, that purpose does not negate Fourth Amendment guarantees.

In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference. The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits. See *Delaware* v. *Prouse, supra,* at 661.

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[2] This situation is to be distinguished from the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer. See *United States* v. *Brignoni-Ponce,* 422 U. S. 873, 884–885 (1975); *Christensen* v. *United States,* 104 U. S. App. D. C. 35, 36, 259 F. 2d 192, 193 (1958).

The application of Tex. Penal Code Ann., Tit. 8, § 38.02 (1974), to detain appellant and require him to identify himself violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct.[3] Accordingly, appellant may not be punished for refusing to identify himself, and the conviction is

Reversed.

APPENDIX TO OPINION OF THE COURT

"THE COURT: . . . What do you think about if you stop a person lawfully, and then if he doesn't want to talk to you, you put him in jail for committing a crime.

"MR. PATTON [Prosecutor]: Well first of all, I would question the Defendant's statement in his motion that the First Amendment gives an individual the right to silence.

"THE COURT: . . . I'm asking you why should the State put you in jail because you don't want to say anything.

"MR. PATTON: Well, I think there's certain interests that have to be viewed.

"THE COURT: Okay, I'd like you to tell me what those are.

"MR. PATTON: Well, the Governmental interest to maintain the safety and security of the society and the citizens to live in the society, and there are certainly strong Governmental interests in that direction and because of that, these interests outweigh the interests of an individual for a certain amount of intrusion upon his personal liberty. I think these Governmental interests outweigh the individual's interests in

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[3] We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements. See *Dunaway* v. *New York*, 442 U. S. 200, 210 n. 12 (1979); *Terry* v. *Ohio*, 392 U. S. 1, 34 (1968) (WHITE, J., concurring). The County Court Judge who convicted appellant was troubled by this question, as shown by the colloquy set out in the Appendix to this opinion.

this respect, as far as simply asking an individual for his name and address under the proper circumstances.

"THE COURT: But why should it be a crime to not answer?

"MR. PATTON: Again, I can only contend that if an answer is not given, it tends to disrupt.

"THE COURT: What does it disrupt?

"MR. PATTON: I think it tends to disrupt the goal of this society to maintain security over its citizens to make sure they are secure in their gains and their homes.

"THE COURT: How does that secure anybody by forcing them, under penalty of being prosecuted, to giving their name and address, even though they are lawfully stopped?

"MR. PATTON: Well I, you know, under the circumstances in which some individuals would be lawfully stopped, it's presumed that perhaps this individual is up to something, and the officer is doing his duty simply to find out the individual's name and address, and to determine what exactly is going on.

"THE COURT: I'm not questioning, I'm not asking whether the officer shouldn't ask questions. I'm sure they should ask everything they possibly could find out. *What I'm asking is what's the State's interest in putting a man in jail because he doesn't want to answer something.* I realize lots of times an officer will give a defendant a Miranda warning which means a defendant doesn't have to make a statement. Lots of defendants go ahead and confess, which is fine if they want to do that. But if they don't confess, you can't put them in jail, can you, for refusing to confess to a crime?" App. 15–17 (emphasis added).

Syllabus

BARRY, CHAIRMAN, RACING AND WAGERING BOARD OF NEW YORK, ET AL. *v.* BARCHI

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 77–803. Argued November 7, 1978—Decided June 25, 1979

The New York State Racing and Wagering Board (Board), which is empowered to license horse trainers participating in harness horse-race meets in New York, has issued regulations specifying the standards of conduct that a trainer must satisfy to retain his license. The trainer's responsibility rules provide that when a postrace test of a horse reveals the presence of drugs, it is to be presumed—subject to rebuttal—that the drug was either administered by the trainer or resulted from his negligence in failing adequately to protect against such occurrence. Under a New York statute (§ 8022), a suspended licensee is entitled to a postsuspension hearing, but the statute specifies no time in which the hearing must be held, affords the Board as long as 30 days after the hearing in which to issue a final order, and ordains that "[p]ending such hearing and final determination thereon, the action of the [Board] in . . . suspending a license . . . shall remain in full force and effect." Pursuant to the trainer's responsibility rules and the evidentiary presumption created therein, the Board summarily suspended appellee's trainer's license for 15 days on the basis of a postrace test that revealed a drug in the system of a horse trained by him. Without resorting to the § 8022 procedures, appellee filed suit in Federal District Court, challenging the constitutionality of § 8022 and the evidentiary presumption under the Board's rules. The court upheld the presumption, but concluded that § 8022 was unconstitutional under the Due Process Clause of the Fourteenth Amendment, since it permitted the State to sanction a trainer without either a presuspension or a prompt postsuspension hearing, and that § 8022 also violated the Equal Protection Clause of the Fourteenth Amendment, since it prohibited a stay of a license suspension pending administrative review, whereas under the laws applicable to thoroughbred racing, suspensions could be stayed pending appeal.

Held:

1. Section 8022 does not violate the Due Process Clause by authorizing summary suspensions without a presuspension hearing. Although

appellee has a property interest in his license under state law sufficient to invoke due process protections, and although the magnitude of a trainer's interest in avoiding suspension is substantial, the State also has an important interest in assuring the integrity of racing carried on under its auspices. In these circumstances, the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that will definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging. Here, the State adduced the assertion of its testing official as proof that appellee's horse had been drugged, and, at the interim suspension stage, an expert's affirmance would appear sufficiently reliable to satisfy constitutional requirements. As for appellee's culpability, in light of the Board's trainer's responsibility rules, the inference, predicated on the fact of drugging, that appellee was at least negligent will be accepted as defensible, and the State will not be put to further presuspension proof that appellee had not complied with the applicable rules. Pp. 63–66.

2. However, appellee was not assured a sufficiently timely post-suspension hearing and § 8022 was unconstitutionally applied in this respect. The statutory provision for an administrative hearing, neither on its face nor as applied, assured a prompt proceeding and prompt disposition of the outstanding issues between appellee and the State, it being as likely as not that appellee and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed. Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount, and there is little or no state interest in an appreciable delay in going forward with a full hearing. P. 66.

3. The State's prohibition of administrative stays pending a hearing in the harness racing context without a like prohibition in thoroughbred racing does not deny harness racing trainers equal protection of the laws. The legislative history of § 8022 makes clear that it and other provisions applicable to harness racing resulted from a legislative conclusion that harness racing should be subject to strict regulation, and appellee has not demonstrated that the acute problems attending harness racing also plague thoroughbred racing and that both types of racing should be treated identically. Also, the procedural mechanism selected to mitigate the threats to the public interest arising in the harness racing context is rationally related to the achievement of that goal. Pp. 67–68.

436 F. Supp. 775, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part, in which STEWART, MARSHALL, and STEVENS, JJ., joined, *post*, p. 68.

Robert S. Hammer, Assistant Attorney General of New York, argued the cause for appellants. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General.

Joseph A. Faraldo argued the cause and filed a brief for appellee.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The New York State Racing and Wagering Board (Board) is empowered to license horse trainers and others participating in harness horse-race meets in New York.[1] The Board also issues regulations setting forth the standards of conduct that a horse trainer must satisfy to retain his license.[2] Among

*Briefs of *amici curiae* urging affirmance were filed by *Dominic H. Frinzi* and *Joseph F. Asher* for Harness Horsemen International, Inc.; by *Philip P. Ardery* for the Horsemen's Benevolent and Protective Association; and by *Roger D. Smith* for the Jockeys' Guild, Inc.

O. Carlysle McCandless, Miles M. Tepper, Ira A. Finkelstein, and *Ruth D. MacNaughton* filed a brief for the New York Racing Association, Inc., as *amicus curiae.*

[1] New York Unconsol. Laws § 8010 (1) (McKinney 1979) authorizes the "state harness racing commission," whose powers are now exercised by the New York State Racing and Wagering Board, see §§ 7951–a, 8162 (McKinney 1979), to "license drivers and such other persons participating in harness horse race meets, as the commission may by rule prescribe . . . ." See also 9 N. Y. C. R. R. § 4101.24 (1975).

[2] The Board has issued, in particular, a series of rules specifying a trainer's responsibility for the condition of horses under the trainer's care, 9 N. Y. C. R. R. §§ 4116.11, 4120.5, 4120.6 (1974):

"4116.11. *Trainer's responsibility.* A trainer is responsible for the condition, fitness, equipment, and soundness of each horse at the time it is declared to race and thereafter when it starts in a race."

"4120.5. *Presumptions.* Whenever [certain tests required to be made on horses that place first, second, or third in a race] disclose the presence

other things, the rules issued by the Board forbid the drugging of horses within 48 hours of a race and make trainers responsible for the condition and soundness of their horses before, during, and after a race.[3] A trainer is forbidden to permit a horse in his custody to start a race "if he knows, or if by the exercise of reasonable care he might have known or have cause to believe" that a horse trained by him has been drugged.[4]

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in any horse of any drug, stimulant, depressant or sedative, in any amount whatsoever, it shall be presumed:

"(a) that the same was administered by a person or persons having the control and/or care and/or custody of such horse with the intent thereby to affect the speed or condition of such horse and the result of the race in which it participated;

"(b) that it was administered within the period prohibited [by § 4120.4 (d), see n. 3, *infra*]; and

"(c) that a sufficient quantity was administered to affect the speed or condition of such animal.

"4120.6. *Trainer's responsibility.* A trainer shall be responsible at all times for the condition of all horses trained by him. No trainer shall start a horse or permit a horse in his custody to be started if he knows, or if by the exercise of reasonable care he might have known or have cause to believe, that the horse has received any drug, stimulant, sedative, depressant, medicine, or other substance that could result in a positive test. Every trainer must guard or cause to be guarded each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person not employed by or connected with the owner or trainer from administering any drug, stimulant, sedative, depressant, or other substance resulting in a positive test."

[3] Title 9 N. Y. C. R. R. § 4120.4 (1974) provides in part:

"No person shall, or attempt to, or shall conspire with another or others to:

"(a) Stimulate or depress a horse through the administration of any drug, medication, stimulant, depressant, hypnotic or narcotic.

. . . . . .

"(d) Administer any drug, medicant, stimulant, depressant, narcotic or hypnotic to a horse within 48 hours of its race."

See also § 4116.11, quoted in n. 2, *supra*.

[4] 9 N. Y. C. R. R. § 4120.6 (1974), quoted in n. 2, *supra*.

Every trainer is required to "guard or cause to be guarded each horse trained by him in such manner . . . as to prevent any person not employed by or connected with the owner or trainer from administering any drug . . . ." [5] And when a postrace test, which must be administered to horses finishing first, second, or third, reveals the presence of drugs, it is to be presumed—subject to rebuttal—that the drug "was either administered by the trainer or resulted from his negligence in failing to adequately protect against such occurrence." [6]

On June 22, 1976, Be Alert, a harness race horse trained by appellee, John Barchi, finished second in a race at Monticello Raceway. Two days later, Barchi was advised by the Board steward that a postrace urinalysis had revealed a drug in Be Alert's system. Barchi proclaimed his innocence, and two lie-detector tests supported his lack of knowledge of the drugging. On July 8, relying on the trainer's responsibility rules and the evidentiary presumption arising thereunder, the steward suspended Barchi for 15 days, commencing July 10.[7] Under § 8022 of the New York Uncon-

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[5] *Ibid.*

[6] *Barchi* v. *Sarafan*, No. 76 Civ. 3070 (SDNY, Dec. 23, 1976), reprinted in App. to Juris. Statement 24a; see *Barchi* v. *Sarafan*, 436 F. Supp. 775, 784 (SDNY 1977); App. 25a (affidavit of John Barchi). The Assistant Attorney General of New York interpreted the presumption in this way both before the three-judge court and in oral argument before this Court:

"QUESTION: What this is is a presumption to get the matter started and that can be rebutted by other evidence.

"MR. HAMMER: Absolutely, Your Honor. This is a permissive presumption. It is a rule of evidence, nothing more." Tr. of Oral Arg. 7. See *id.*, at 5; Tr. 33–34 (trainer not held absolutely responsible for drugging of horse "if it is shown that the trainer was not culpable, that he, himself, could not administer the drug and he was not found to be negligent in supervising the people under him").

[7] Title 9 N. Y. C. R. R. § 4105.8 (f) (1974) authorizes presiding judges "[w]here a violation of any rule is suspected to conduct an inquiry promptly and to take such action as may be appropriate . . . ." New

solidated Laws,[8] a suspended licensee is entitled to a post-suspension hearing, but the section ordains that "[p]ending such hearing and final determination thereon, the action of

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York Unconsol. Laws § 8010 (2) (McKinney 1979) states the grounds for revocation or suspension:

". . . The commission may suspend or revoke a license issued pursuant to this section if it shall determine that (a) the applicant or licensee (1) has been convicted of a crime involving moral turpitude; (2) has engaged in bookmaking or other form of illegal gambling; (3) has been found guilty of any fraud in connection with racing or breeding; (4) has been guilty of any violation or attempt to violate any law, rule or regulation of any racing jurisdiction for which suspension from racing might be imposed in such jurisdiction; (5) or . . . has violated any rule, regulation or order of the commission, or [that (b)] the experience, character or general fitness of any applicant or licensee is such [that] the participation of such person in harness racing or related activities would be inconsistent with the public interest, convenience or necessity or with the best interests of racing generally."

[8] New York Unconsol. Laws § 8022 (McKinney 1979) provides in full:

"If the state harness racing commission shall refuse to grant a license applied for under this act, or shall revoke or suspend such a license granted by it, or shall impose a monetary fine upon a participant in harness racing the applicant or licensee or party fined may demand, within ten days after notice of the said act of the commission, a hearing before the commission and the commission shall give prompt notice of a time and place for such hearing at which the commission will hear such applicant or licensee or party fined in reference thereto. Pending such hearing and final determination thereon, the action of the commission in refusing to grant or in revoking or suspending a license or in imposing a monetary fine shall remain in full force and effect. The commission may continue such hearing from time to time for the convenience of any of the parties. Any of the parties affected by such hearing may be represented by counsel, and the commission may be represented by the attorney-general, a deputy attorney-general or its counsel. In the conduct of such hearing the commission shall not be bound by technical rules of evidence, but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. In connection with such hearing, each member of the

the [Board] in . . . suspending a license . . . shall remain in full force and effect." The section specifies no time in which the hearing must be held, and it affords the Board as long as 30 days after the conclusion of the hearing in which to issue a final order adjudicating a case. Without resorting to the § 8022 procedures, Barchi filed this suit in the United States District Court.

Barchi alleged that his trainer's license was protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and that § 8022 was unconstitutional because it permitted his license to be suspended without a prior hearing to determine his culpability and because a summary suspension could not be stayed pending the administrative review provided by the statute. Barchi also challenged the rule permitting the Board to presume rebuttably from the drugging of a horse that its trainer was responsible. His claim was that "there is no rational connection between the fact proved, that the horse was illegally drugged, and the ultimate fact presumed that the trainer is guilty of the act or carelessly guarded against the act occurring," App. 15a (complaint), it being impossible, Barchi alleged, for the trainer to guard the horse against all those who by stealth might gain

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commission shall have the power to administer oaths and examine witnesses, and may issue subpoenas to compel attendance of witnesses, and the production of all material and relevant reports, books, papers, documents, correspondence and other evidence. The commission may, if occasion shall require, by order, refer to one or more of its members or officers, the duty of taking testimony in such matter, and to report thereon to the commission, but no determination shall be made therein except by the commission. Within thirty days after the conclusion of such hearing, the commission shall make a final order in writing, setting forth the reasons for the action taken by it and a copy thereof shall be served on such applicant or licensee or party fined, as the case may be. The action of the commission in refusing to grant a license or in revoking or suspending a license or in imposing a monetary fine shall be reviewable in the supreme court in the manner provided by the provisions of article seventy-eight of the civil practice law and rules."

access to it. Barchi's third claim was that, in prohibiting a stay of his suspension pending administrative review, § 8022 denied him equal protection of the laws, since in the context of thoroughbred racing, in contrast to harness racing, suspensions can be stayed pending appeal.[9]

The District Court upheld the evidentiary presumption on its face, concluding: "[T]he duty of a trainer to oversee his horses is sufficiently connected to the occurrence of tampering to support the presumption established by the trainer's 'insurer' rules. The state's definition of trainer responsibility is reasonably related to the interests involved and, given the rebuttable nature of the 4120.5 presumption, the high standard of accountability is not unconstitutional." *Barchi* v. *Sarafan*, 436 F. Supp. 775, 784 (SDNY 1977). The District Court went on to hold, however, that § 8022 of the New York law was unconstitutional under the Due Process Clause since it permitted the State "to irreparably sanction a harness race horse trainer without a pre-suspension or a prompt post-sus-

[9] The provision applicable to thoroughbred racing, N. Y. Unconsol. Laws § 7915 (3) (McKinney 1979), provides:

"No license shall be revoked unless such revocation is at a meeting of the state racing commission on notice to the licensee, who shall be entitled to a hearing in respect of such revocation. In the conduct of such hearing the commission shall not be bound by technical rules of evidence but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. The action of the commission in refusing, suspending or in revoking a license shall be reviewable in the supreme court in the manner provided by the provisions of article seventy-eight of the civil practice law and rules. Such hearing may be held by the chairman thereof or by any commissioner designated by him in writing, and the chairman or said commissioner may issue subpoenas for witnesses and administer oaths to witnesses. The chairman or commissioner holding such hearing shall, at the conclusion thereof, make his findings with respect thereto and said findings, if concurred in by two members of the commission, shall become the findings and determination of the commission."

pension hearing in violation of plaintiff's right to due process." App. to Juris. Statement 2a (order of judgment).[10] The court further concluded that the difference between the procedures applicable to harness racing and those applicable to thoroughbred racing was so unwarranted as to violate the Equal Protection Clause of the Fourteenth Amendment.

We noted probable jurisdiction of the appeal. 435 U. S. 921 (1978). In this Court, the appellants adhere to their fundamental position that, as a constitutional matter, Barchi was entitled to no more process than was available to him under § 8022 either before or after the suspension was imposed and became effective. Barchi, on the other hand, continues to insist that his suspension could in no event become effective without a prior hearing to establish that his horse had been drugged and that he was culpable.

We agree with appellants that § 8022 does not affront the Due Process Clause by authorizing summary suspensions without a presuspension hearing, and we reject Barchi's contrary contention. In disagreement with appellants, however,

[10] The District Court declined to abstain to permit the state courts to construe § 8022 prior to adjudication of Barchi's constitutional claims on their merits. Appellants had maintained that the provision might be construed to give the Board discretion to stay suspensions pending the outcome of the postsuspension hearing provided by § 8022. The District Court thought the language of the statute unequivocally foreclosed that construction. We cannot say that the District Court erred in this respect. Section 8022 provides that, pending a full hearing and final determination thereon, "the action of the [Board] in . . . suspending a license . . . *shall* remain in full force and effect." (Emphasis added.) The provision gives no assurance of a presuspension or prompt postsuspension hearing and determination. And it makes clear that the Board need not reach a determination until "thirty days after the conclusion of [the] hearing."

We reject appellants' further contention that Barchi should not have commenced suit prior to exhausting the procedure contemplated under § 8022. Under existing authority, exhaustion of administrative remedies is not required when "the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit." *Gibson* v. *Berryhill*, 411 U. S. 564, 575 (1973).

we conclude that Barchi was not assured a sufficiently timely postsuspension hearing and that § 8022 was unconstitutionally applied in this respect.

It is conceded that, under New York law, Barchi's license could have been suspended only upon a satisfactory showing that his horse had been drugged and that he was at least negligent in failing to prevent the drugging. As a threshold matter, therefore, it is clear that Barchi had a property interest in his license sufficient to invoke the protection of the Due Process Clause.[11] We do not agree with Barchi's basic contention, however, that an evidentiary hearing was required prior to the effectuation of his suspension. Unquestionably, the magnitude of a trainer's interest in avoiding suspension is substantial; but the State also has an important interest in assuring the integrity of the racing carried on under its auspices. In these circumstances, it seems to us that the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging. Cf. *Gerstein* v. *Pugh*, 420 U. S. 103, 111–112 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U. S.

[11] Under New York law, a license may not be revoked or suspended at the discretion of the racing authorities. Cf. *Bishop* v. *Wood*, 426 U. S. 341 (1976). Rather, suspension may ensue only upon proof of certain contingencies. See N. Y. Unconsol. Laws § 8010 (McKinney 1979), quoted in n. 7, *supra*. Notably, when a horse is found to have been drugged, the license of the horse's trainer may be suspended or revoked if he did the drugging, if he knew or should have known that the horse had been drugged, or if he negligently failed to prevent it. Accordingly, state law has engendered a clear expectation of continued enjoyment of a license absent proof of culpable conduct by the trainer. Barchi, therefore, has asserted a legitimate "claim of entitlement . . . that he may invoke at a hearing." *Perry* v. *Sindermann*, 408 U. S. 593, 601 (1972); see *Board of Regents* v. *Roth*, 408 U. S. 564 (1972); *Bell* v. *Burson*, 402 U. S. 535, 539 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).

600, 609 (1974); *Bell* v. *Burson*, 402 U. S. 535, 542 (1971). In such circumstances, the State's interest in preserving the integrity of the sport and in protecting the public from harm becomes most acute. At the same time, there is substantial assurance that the trainer's interest is not being baselessly compromised.

Under this standard, Barchi received all the process that was due him prior to the suspension of his license. As proof that Barchi's horse had been drugged, the State adduced the assertion of its testing official, who had purported to examine Barchi's horse pursuant to prescribed testing procedures. To establish probable cause, the State need not postpone a suspension pending an adversary hearing to resolve questions of credibility and conflicts in the evidence. At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements.

As for Barchi's culpability, the New York trainer's responsibility rules, approved by the District Court, established a rebuttable presumption or inference, predicated on the fact of drugging, that Barchi was at least negligent. In light of the duties placed upon the trainer by the trainer's responsibility rules, we accept this inference of culpability as defensible and would not put the State to further presuspension proof that Barchi had not complied with the applicable rules. Furthermore, although Barchi was not given a formal hearing prior to the suspension of his license, he was immediately notified of the alleged drugging, 16 days elapsed prior to the imposition of the suspension, and he was given more than one opportunity to present his side of the story to the State's investigators. In fact, he stated his position in the course of taking two lie-detector examinations. He points to nothing in the record demonstrating convincingly that he was not negligent, and the State's investigators apparently failed to unearth an explanation for the drugging that would completely exonerate

him. Even if the State's presuspension procedures, then, were not adequate finally to resolve the issues fairly and accurately, they sufficed for the purposes of probable cause and interim suspension.

That the State's presuspension procedures were satisfactory, however, still leaves unresolved how and when the adequacy of the grounds for suspension is ultimately to be determined. As the District Court found, the consequences to a trainer of even a temporary suspension can be severe; and we have held that the opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). Here, the provision for an administrative hearing, neither on its face nor as applied in this case, assured a prompt proceeding and prompt disposition of the outstanding issues between Barchi and the State. Indeed, insofar as the statutory requirements are concerned, it is as likely as not that Barchi and others subject to relatively brief suspensions would have no opportunity to put the State to its proof until they have suffered the full penalty imposed. Yet, it is possible that Barchi's horse may not have been drugged and Barchi may not have been at fault at all. Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount, it seems to us. We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state-supervised horse racing.

In these circumstances, it was necessary that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay. Because the statute as applied in this case was deficient in this respect, Barchi's suspension was constitutionally infirm under the Due Process Clause of the Fourteenth Amendment.

The question remains whether the State's prohibition of administrative stays pending a hearing in the harness racing context without a like prohibition in thoroughbred racing denies harness racing trainers equal protection of the laws. The District Court acknowledged that the inquiry in this respect is "whether or not the classification is without a reasonable basis." 436 F. Supp., at 783. Put another way, a statutory classification such as this should not be overturned "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979). In holding that § 8022 violated the Equal Protection Clause, the District Court misapplied this standard. The legislative history of § 8022 makes clear that the section and other provisions applicable to harness racing resulted from a legislative conclusion that harness racing should be subject to strict regulation,[12] and neither Barchi nor the District Court has demonstrated that the acute problems attending harness racing also plague the thoroughbred racing industry. Barchi has not shown that the two industries should be identically regulated in all respects; he has not convinced us that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be

[12] In response to the slaying of a union official who represented employees at a harness track and the resulting disclosure of "a pattern of activities . . . clearly inimical to the public interest," Governor Dewey appointed a commission to inquire into the general regulation of harness tracks. N. Y. Legis. Doc. No. 86, 177th Sess., 3 (1954). The investigation disclosed that harness racing had become "a lush and attractive field for every kind of abuse." *Id.*, at 4; see Report of the New York State Commission, in Public Papers of Governor Thomas E. Dewey 505 (1954). The Commission recommended major changes in the harness racing laws, including enactment of the provisions of § 8022 ruled unconstitutional by the District Court. See 1954 N. Y. Laws, ch. 510, § 8; Report of the New York State Commission, *supra*, at 512.

true by the governmental decisionmaker." *Vance* v. *Bradley*, *supra*, at 111. It was not the State's burden to disprove by resort to "current empirical proof," 440 U. S., at 110, Barchi's bare assertions that thoroughbred and harness racing should be treated identically.

It also seems clear to us that the procedural mechanism selected to mitigate the threats to the public interest arising in the harness racing context is rationally related to the achievement of that goal. The State could reasonably conclude that swift suspension of harness racing trainers was necessary to protect the public from fraud and to foster public confidence in the harness racing sport. Accordingly, we think the District Court erred in disapproving the difference in the procedural courses applicable to harness racing and thoroughbred racing.

We thus affirm the judgment of the District Court insofar as it ruled Barchi's suspension unconstitutional for lack of assurance of a prompt postsuspension hearing. We reverse its judgment, however, to the extent that it declared § 8022 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The judgment of the District Court is accordingly affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.[13]

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, concurring in part.

I agree that the District Court properly declined either to abstain in this case or to require exhaustion of state remedies

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[13] We express no view on whether the procedures under § 8022, as that section may have been modified by subsequent legislation, satisfy the strictures of the Due Process Clause. After the District Court rendered its decision, the Appellate Division of the New York Supreme Court

that were themselves being challenged as unconstitutional.[1]

I also agree that appellee's trainer's license clothes him with a constitutionally protected interest of which he cannot be deprived without procedural due process. What was said of automobile drivers' licenses in *Bell* v. *Burson*, 402 U. S. 535,

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nullified a Board order summarily suspending a veterinarian's license to practice medicine at racetracks on the ground that the Board had not made "any finding that the public health, safety, or welfare imperatively required such emergency action as a suspension prior to a hearing." *Gerard* v. *Barry*, 59 App. Div. 2d 901, 399 N. Y. S. 2d 876 (1977). The court relied on § 401 (3) of the State Administrative Procedure Act, N. Y. State Admin. Proc. Act § 401 (3) (McKinney Supp. 1977), which provides:

"If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered, effective on the date specified in such order or upon service of a certified copy of such order on the licensee, whichever shall be later, pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined."

Section 401 (3) did not take effect until September 1, 1976, two months after Barchi was suspended. The section has no bearing on the constitutionality of procedures under § 8022 as applied to persons like Barchi who were suspended prior to its effective date. See N. Y. State Admin. Proc. Act § 103 (3) (McKinney Supp. 1977).

[1] I also agree that the Court need not address the District Court's holding that the rebuttable presumption of trainer responsibility is constitutional; appellee did not cross appeal, and he is not to be heard upon the challenge to that holding made in his brief, since agreement with that challenge would result in greater relief than was awarded him by the District Court. See *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 560 n. 11 (1976); *United States* v. *Raines*, 362 U. S. 17, 27 n. 7 (1960).

Lower court decisions conflict on the question whether an *irrebuttable* presumption of trainer responsibility is constitutional. Compare *Brennan* v. *Illinois Racing Board*, 42 Ill. 2d 352, 247 N. E. 2d 881 (1969) (irrebuttable presumption unconstitutional), with *Hubel* v. *West Virginia Racing Comm'n*, 513 F. 2d 240 (CA4 1975) (irrebuttable presumption constitutional). See generally Note, Brennan v. Illinois Racing Board: The Validity of Statutes Making a Horse Trainer the Absolute Insurer for the Condition of His Horse, 74 Dick. L. Rev. 303 (1970).

539 (1971), is even more true of occupational licenses such as Barchi's:

> "Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses . . . involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."

See *Dixon* v. *Love*, 431 U. S. 105, 112 (1977); *Gibson* v. *Berryhill*, 411 U. S. 564 (1973); cf. *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96 (1978). *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), stated, in identifying protected interests, that *Bell* v. *Burson* was an example of situations in which "[t]he Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." [2]

Appellants seek to avoid these cases by characterizing appellee's license as a "privilege" and arguing that one who has accepted the benefits of a license is precluded from challenging the conditions attached to it, including the procedures for suspension and revocation. See *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) (plurality opinion). The Court properly rejects this contention—indeed, does not even mention it. *Board of Regents* v. *Roth*, *supra*, at 571, emphasized that "the

[2] 408 U. S., at 571–572. *Roth* explained that "[t]o have a [protected] property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.*, at 577. No extended inquiry into the formal and informal "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits," *ibid.*, is necessary here. Cf. *Perry* v. *Sindermann*, 408 U. S. 593, 599–603 (1972). Appellee's claim to an entitlement in his duly issued trainer's license is confirmed by the state statutes authorizing the issuance of licenses. See N. Y. Unconsol. Laws § 8010 (McKinney 1979).

Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." Having once determined that the interest at stake is protected by the Due Process Clause, a court has occasion only to inquire what process is due. See *Dixon* v. *Love, supra,* at 112; *Mathews* v. *Eldridge,* 424 U. S. 319, 332–333 (1976).

Turning then to the question whether the procedures available to Barchi satisfied the mandates of due process, appellants argue that the State's interests in protecting horses and in protecting the repute of racing and the State's income derived from racing justify summary suspensions of trainers' licenses when traces of drugs are allegedly found in their horses' urine.[3] Prior decisions establish that "[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event,'" *Board of Regents* v. *Roth, supra,* at 570 n. 7, quoting *Boddie* v. *Connecticut,* 401 U. S. 371, 379 (1971); see *Smith* v. *Organization of Foster Families,* 431 U. S. 816, 848 (1977); *Bell* v. *Burson, supra,* at 542. Even where a State's

[3] Cf. *Hubel* v. *West Virginia Racing Comm'n, supra,* which described West Virginia's interests as follows:

"The state has at least two substantial interests to be served. It has a humanitarian interest in protecting the health of the horse, and it has a broader and more weighty interest in protecting the purity of the sport, both from the standpoint of protecting its own substantial revenues derived from taxes on legalized pari-mutuel betting and protecting patrons of the sport from being defrauded. . . . If a horse is fleeter or slower than his normal speed because of having been drugged, the integrity of the race is irretrievably lost. Of course, if stimulated, his artificial position at the finish may be corrected and he may be deprived of any purse that he apparently won. But the interests of bettors cannot be protected. Winning tickets must be paid promptly at the end of the race before the disqualification of the horse, except for the most obvious reasons, can be accomplished." 513 F. 2d, at 243–244.

interests justify action, after only summary informal proceedings, that temporarily infringes on protected interests pending a later full hearing, that full hearing must be available *promptly* after the temporary deprivation occurs. See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); *Goldberg* v. *Kelly*, 397 U. S. 254, 266–267 (1970). In any event,

> "[t]his Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. [Citations omitted.] The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). See *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914)." *Mathews* v. *Eldridge*, *supra*, at 333.

The District Court held in this case that "[o]n balance . . . the absence of either a pre-suspension hearing or a *prompt* post-suspension hearing denie[d Barchi] the meaningful review due process requires." *Barchi* v. *Sarafan*, 436 F. Supp. 775, 782 (SDNY 1977). I agree with the District Court and with the Court that the absence of an opportunity for a prompt postsuspension hearing denied Barchi due process. Given the "in the alternative" phrasing of the District Court's judgment and the absence of a cross-appeal by Barchi,[4] however, I would not reach the question whether due process required a presuspension hearing in this case. Even assuming that the presuspension procedures afforded Barchi satisfied due proc-

[4] See n. 1, *supra*.

ess in light of the State's allegedly substantial interests,[5] the State has failed to identify any substantial interest in postponing Barchi's opportunity for a full hearing once Barchi's license was suspended. Yet the District Court found that no opportunity for an immediate postsuspension full hearing was available. Furthermore, the District Court found that, in harness racing, even a temporary suspension can irreparably damage a trainer's livelihood. Not only does a trainer lose the income from races during the suspension, but also, even more harmful, he is likely to lose the clients he has collected over the span of his career.[6] Where, as here, even a short

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[5] My reservation of the presuspension hearing issue does not imply agreement with the Court on this matter. The record in this case, in my view, raises serious doubts that the alleged state interests in this context are sufficient to justify postponing a trainer's hearing until after his suspension. See *Mackey* v. *Montrym*, *ante*, at 25–26 (STEWART, J., dissenting). The asserted importance of New York's interests in summary action is plainly depreciated by the State Board's claimed practice of staying suspensions when appropriate. See Tr. of Oral Arg. 10–12; Tr. 27–30; affidavit of John M. Dailey, Aug. 26, 1976, App. 34a. Moreover, in this case 16 days elapsed between the positive urine test and the suspension order. These practices are hardly consistent with appellants' claim that summary suspensions are necessary to serve important state interests whenever a drug test is positive.

[6] "Race horse trainers may be entrusted with the care of a number of trotters at any given time. A trainer's income is derived in large measure from the proceeds of horse races (as opposed to a salary), and, since, harness 'meetings' are sporadic, trainers cannot recapture the racing opportunities lost by missed meetings. Once a trainer is suspended, even for a brief period, an owner will immediately seek the services of another trainer so that the horse is not barred from racing. This change is often permanent in order to avoid further disruption in the care of the animal. Significantly, plaintiff has proffered the affidavit of a third-party trainer/driver who experienced just such a loss during a suspension for a similar drug infraction. He had also suffered irreparable damage for a subsequent *ex parte* suspension that was later reversed. Racing opportunities lost because of a suspension cannot be recovered by a later reversal in [a] review hearing for obvious reasons. Furthermore, defendants do not

temporary suspension threatens to inflict substantial and irreparable harm, an "initial" deprivation quickly becomes "final," and the procedures afforded either before or immediately after suspension are *de facto* the final procedures. A final full hearing and determination after Barchi had been barred from racing his horses and had lost his clients to other trainers was aptly described by the District Court as an "exercise in futility," 436 F. Supp., at 782, and would certainly not qualify as a "meaningful opportunity to be heard at a meaningful time." To be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided—*i. e.*, either before or immediately after suspension.

I therefore join those parts of the Court's opinion holding that the District Court properly refused to abstain or to require exhaustion and that the procedures available to Barchi failed to satisfy the requirements of due process because they did not assure a suspended trainer an opportunity for an immediate postsuspension full hearing and determination. In light of this holding, of Barchi's failure to cross appeal from the judgment of the District Court, and of possibly significant changes in the procedures applicable to all future suspensions,[7] I would not reach the additional questions whether Barchi was constitutionally entitled to a *pre*-suspension hearing and whether the difference between the procedures in harness racing and those in flat racing violates the Equal Protection Clause.

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dispute the fact that a loss of horses in a trainer's stable occasioned during his suspension can often be an irremediable injury, even though such suspension is erroneous and without justification." *Barchi* v. *Sarafan*, 436 F. Supp. 775, 778 (SDNY 1977).

See affidavit of John Barchi, July 12, 1976, App. 23a; affidavit of Lucien Fontaine, Aug. 17, 1976, App. 39a.

[7] See *ante*, at 68–69, n. 13.

Accordingly, I would affirm the judgment of the District Court insofar as it nullifies Barchi's suspension because the procedures applicable to his case at the time of his suspension did not satisfy due process. Like the Court, I express no view as to the constitutionality of procedures under § 8022 as it may have been modified by subsequent legislation; I would therefore vacate that portion of the District Court's judgment that declares § 8022 unconstitutional and enjoins its enforcement.

CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WESTCOTT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 78–437. Argued April 16, 1979—Decided June 25, 1979*

Section 407 of the Social Security Act, which governs the Aid to Families with Dependent Children, Unemployed Father (AFDC–UF) program, provides benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father, but does not provide such benefits when the mother becomes unemployed. This class action was instituted in Federal District Court against the Secretary of the Department of Health, Education, and Welfare (Secretary) and the Commissioner of the Massachusetts Department of Public Welfare (Commissioner) by appellees, two couples (each having an infant son) who satisfy all the requirements for AFDC–UF benefits except for the requirement that the parent who is "unemployed" within the meaning of the Act and applicable regulations be the father. Appellees alleged that § 407 and its implementing regulations discriminate on the basis of gender in violation of the Fifth and Fourteenth Amendments, and sought declaratory and injunctive relief. The District Court declared § 407 unconstitutional insofar as it establishes a classification which discriminates solely on the basis of sex, and determined that extension of the AFDC–UF program to all families with needy children where *either* parent is unemployed, rather than nullification of the program, was the proper remedial course. Subsequently, the District Court declined to modify its order so as to permit the Commissioner to pay benefits only to those families where needy children have been deprived of parental support by the unemployment of the family's "principal wage-earner." The Secretary challenges only the holding on the constitutionality of § 407, whereas the Commissioner challenges only the relief.

Held:

1. The gender classification of § 407 is not substantially related to the attainment of any important and valid statutory goals; it is, rather,

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*Together with No. 78–689, *Pratt, Commissioner, Department of Public Welfare of Massachusetts* v. *Westcott et al.*, also on appeal from the same court.

part of the "baggage of sexual stereotypes," *Orr* v. *Orr*, 440 U. S. 268, 283, that presumes the father has the "primary responsibility to provide a home and its essentials," *Stanton* v. *Stanton*, 421 U. S. 7, 10, while the mother is the "center of home and family life." *Taylor* v. *Louisiana*, 419 U. S. 522, 534 n. 15. Legislation that rests on such presumptions, without more, cannot survive scrutiny under the Due Process Clause of the Fifth Amendment. Pp. 83–89.

(a) The constitutionality of § 407 cannot be sustained on the theory that although it incorporates a gender distinction, it does not discriminate against women as a class because it affects family units rather than individuals. Pp. 83–85.

(b) Nor can § 407's gender distinction survive constitutional scrutiny as being substantially related to achievement of an important governmental objective. It does not serve the statutory goal of providing aid for needy children, nor is it substantially related to achieving the alleged objective of the AFDC–UF program of reducing the incentive for fathers to desert in order to make their families eligible for assistance. Pp. 85–89.

2. The District Court's remedial order was proper. Pp. 89–93.

(a) Since no party has argued that nullification of the AFDC–UF program is the proper remedial course, this Court would be inclined to consider that issue only if the power to order extension of the program were clearly beyond the constitutional competence of a federal district court. However, this Court's previous decisions, which routinely have affirmed district court judgments ordering extension of federal welfare programs, suggest strongly that no such remedial incapacity exists. Pp. 89–91.

(b) The District Court, in ordering that benefits be paid to families in which either the mother or the father is unemployed within the meaning of the Act, rather than accepting the "principal wage-earner" model suggested by the Commissioner, adopted the simplest and most equitable extension possible. Pp. 91–93.

460 F. Supp. 737, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, *post*, p. 93.

William H. Alsup argued the cause for appellant in No. 78–437. On the brief were *Solicitor General McCree* and *Sara*

Sun Beale. *Paul W. Johnson*, Assistant Attorney General of Massachusetts, argued the cause for appellant in No. 78–689. With him on the briefs were *Francis X. Bellotti*, Attorney General, and *S. Stephen Rosenfeld*, Assistant Attorney General.

Henry A. Freedman argued the cause for appellees in both cases. With him on the brief for appellees Westcott et al. were *Kenneth P. Neiman* and *Michael B. Trister*. *Solicitor General McCree* filed a brief for the federal appellee in No. 78–689.†

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Section 407 of the Social Security Act, 75 Stat. 75, as amended, 42 U. S. C. § 607, part of the Aid to Families with Dependent Children program, provides benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father, but does not provide such benefits when the mother becomes unemployed. The United States District Court for the District of Massachusetts held that this distinction violates the Due Process Clause of the Fifth Amendment, and ordered that benefits be paid to families deprived of support because of the unemployment of the mother to the same extent they are paid to families deprived of support because of the unemployment of the father. 460 F. Supp. 737 (1978). In these appeals, the Secretary of the Department of Health, Education, and Welfare (HEW), in No. 78–437, challenges the holding on the constitutionality of § 407, but does not question the relief ordered by the District Court; the Commissioner of the Massa-

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†*Ruth Bader Ginsburg, Diana A. Steele, Phyllis N. Segal*, and *Nancy Duff Campell* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance in both cases.

Stephan Landsman, Anthony Touschner, Charles E. Guerrier, and *Barbara Kaye Besser* filed a brief for Cathy Stevens et al. as *amici curiae* urging affirmance in No. 78–437.

chusetts Department of Public Welfare (DPW), in No. 78–689, acquiesces in the decision on the merits, but contests the relief.

I

The Aid to Families with Dependent Children (AFDC) program, 49 Stat. 626, as amended, 42 U. S. C. § 601 *et seq.*, provides financial assistance to families with needy dependent children. The program is administered by participating States, in conformity with federal standards, and is financed by the Federal Government and the States on a matching-funds basis. *King* v. *Smith*, 392 U. S. 309, 316–317 (1968); *Shea* v. *Vialpando*, 416 U. S. 251, 253 (1974).

As originally enacted in 1935, the AFDC program provided benefits to families whose dependent children were needy because of the death, absence, or incapacity of a parent. *Batterton* v. *Francis*, 432 U. S. 416, 418 (1977). This provision, which forms the core of the AFDC program today, is gender neutral: benefits are available to any family so long as one parent of either sex is dead, absent from the home, or incapacitated, and the family otherwise meets the financial requirements of eligibility. 42 U. S. C. § 606.

In 1961, and again in 1962, Congress temporarily extended the AFDC program to provide assistance to families whose dependent children were deprived of support because of a parent's unemployment. *Batterton* v. *Francis*, 432 U. S., at 419; *Philbrook* v. *Glodgett*, 421 U. S. 707, 709–710 (1975). Again, this provision was gender neutral. A "dependent child," for purposes of determining eligibility for AFDC benefits, was defined to include "a needy child . . . who has been deprived of parental support or care by reason of the unemployment . . . of *a parent*." 75 Stat. 75 (emphasis added).

In 1968, as part of a general revision of the Social Security Act, Congress made this extension permanent. In so doing, however, it added a gender qualification to the statute. The

definition of "dependent child" in § 407 was amended to include a "needy child . . . who has been deprived of parental support or care by reason of the unemployment . . . of his *father*." 42 U. S. C. § 607 (a) (emphasis added). This portion of the AFDC program is known as Aid to Families with Dependent Children, Unemployed Father (AFDC–UF). Although all 50 States have chosen to participate in the basic AFDC program, only 26 States (plus Guam and the District of Columbia) take part in the AFDC–UF program. One of these is the Commonwealth of Massachusetts.

Appellees are two couples who, it is stipulated, satisfy all the requirements for AFDC–UF benefits [1] except for the requirement that the unemployed parent be the father. Cindy and William Westcott are married and have an infant son. They applied to the Massachusetts DPW for public assistance, but were informed that they did not qualify because William, who was unable to find work, had not previously been employed for a sufficient period to qualify as an "unemployed" father under the Act and applicable regulations. Cindy, until her recent unemployment, was the family breadwinner, and would have satisfied the "unemployment" criteria had she been male.

Susan and John Westwood are also married and have an

[1] To be eligible for benefits under the AFDC–UF program, a family must meet both financial and categorical requirements. The financial requirements are determined by the participating States, and vary widely from one State to another. *Rosado* v. *Wyman*, 397 U. S. 397, 408–409 (1970). The categorical requirements, however, are largely determined by the Federal Government. The Act itself specifies that the father must have had 6 or more quarters of work in any 13-quarter period ending within one year prior to the application for aid, and must be currently employed for less than 100 hours per month. 42 U. S. C. § 607 (b) (1) (C). In addition, § 407 of the Act gives the Secretary of HEW authority to promulgate regulations further defining the "unemployment" that will render a family eligible for AFDC–UF benefits. *Batterton* v. *Francis*, 432 U. S. 416, 425 (1977). The regulations, like the statute, speak in terms of the unemployment of the "father." 45 CFR § 233.100 (a) (1) (1978).

infant son. They applied for Medicaid benefits as a family eligible for, but not receiving, AFDC–UF benefits.[2] They, too, were turned down on the ground that John's prior work history was insufficient. Susan, like Cindy Westcott, had been the family breadwinner before losing her job, and would have qualified the family for benefits had she been male.

Appellees instituted this class action in the United States District Court for the District of Massachusetts, naming as defendants the Secretary of HEW and the Commissioner of the DPW. Appellees alleged that § 407 and its implementing regulations discriminate on the basis of gender in violation of the Fifth and Fourteenth Amendments. They sought declaratory and injunctive relief.

The District Court certified the case as a class action,[3] and granted appellees' motion for summary judgment. 460 F. Supp. 737 (1978). The court found that the gender qualification of § 407 was not substantially related to the achievement of any important governmental interests. 460 F. Supp., at 748–751. It was, rather, the product of an "archaic and overbroad generalization"—that "mothers in two parent families

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[2] In States that participate in both the AFDC program and the Medicaid program, 42 U. S. C. § 1396 *et seq.*, individuals who qualify for AFDC benefits are also entitled to receive Medicaid benefits. § 1396a (a)(10).

[3] The class was defined as

"those Massachusetts families with two parents in the home and with minor dependent children, born or unborn, who would otherwise be eligible for AFDC under Massachusetts' AFDC program, and hence Medicaid as well, but for the sex discrimination in the federal statute [42 U. S. C. § 607] and Massachusetts regulations [6 CHSR III, Subch. A, Pt. 301, § 301.03; Pt. 303, Subpt. A, §§ 303.01 & 303.04] which provide for the granting of federally funded AFDC and Medicaid to families deprived of support because of the unemployment of their father, but not to families deprived of support because of the mother's unemployment." App. to Juris. Statement in No. 78–437, pp. 39A–40A.

The Secretary does not contest the class certification. Juris. Statement in No. 78–437, p. 5 n. 4.

are not breadwinners, so that loss of their earnings would not substantially affect the families' well being." *Id.*, at 751. The court accordingly declared § 407 unconstitutional "insofar as it establishes a classification which discriminates . . . solely on the basis of sex." 460 F. Supp., at 754.

The District Court then turned to the question of relief. The court saw two remedial alternatives: a simple injunction against further operation of the AFDC–UF program, or extension of the program to all families with needy children where *either* parent is unemployed. *Id.*, at 753. The court decided that extension, rather than nullification, was the proper remedial course; it noted the strength of Congress' commitment to the "specific goal of assisting needy children," and emphasized that if provision of benefits "were halted because of the constitutional defect, many persons would lose their very means of subsistence." *Id.*, at 753–754. The court therefore, by order dated April 20, 1978, enjoined the Commissioner from refusing to grant benefits to families made needy by the unemployment of the mother "in the same amounts and under the same standards" as he grants benefits to families made needy by the unemployment of the father. App. to Juris. Statement in No. 78–437, pp. 41A–42A. The court likewise enjoined the Secretary from refusing to provide federal matching funds for payment of such benefits. *Id.*, at 40A–41A.

Although the Commissioner originally had agreed that this was the appropriate remedy, Juris. Statement in No. 78–689, p. 6, he later sought modification of the District Court's order, so as to effect a more limited extension of the AFDC–UF program. The Commissioner requested that he be permitted to pay benefits "only to those families where needy children have been deprived of parental support or care by the unemployment of *the family's principal wage-earner.*" App. to Juris. Statement in No. 78–689, p. 3a (emphasis added).[4] This

[4] The Commissioner proposed to define "principal wage-earner" as the parent whose earned income or unemployment compensation was greater

modification, he argued, would accomplish a gender-neutral extension of the program at a much lower cost. *Id.*, at 4a. On August 9, 1978, the District Court denied the Commissioner's motion, believing that "any reformulation of the statutory scheme . . . which goes beyond the remedy already ordered in this case is properly left to Congressional action." *Id.*, at 13a.

The Secretary, pursuant to 28 U. S. C § 1252, appealed directly to this Court from the District Court's April 20 decision holding § 407 unconstitutional. App. to Juris. Statement in No. 78–437, p. 43A. The Commissioner took a separate appeal, also pursuant to § 1252, from the District Court's August 9 refusal to modify its remedial order. App. to Juris. Statement in No. 78–689, p. 15a. We noted probable jurisdiction and consolidated the cases for argument. 439 U. S. 1044 (1978).

II

THE SECRETARY'S APPEAL

The Secretary advances two arguments in support of the constitutionality of § 407. First, he contends that although § 407 incorporates a gender distinction, it does not discriminate against women as a class. Second, he urges that the distinction is substantially related to the achievement of an important governmental objective: the need to deter real or pretended desertion by the father in order to make his family eligible for AFDC benefits.

A

The Secretary readily concedes that § 407 entails a gender distinction. Brief for Appellant in No. 78–437, p. 36. He submits, however, that the Act does not award AFDC benefits to a father where it denies them to a mother. Rather, the grant or denial of aid based on the father's unemployment

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during the six months preceding the month of application. App. to Juris. Statement in No. 78–689, pp. 7a–8a.

necessarily affects, to an equal degree, one man, one woman, and one or more children. As the Secretary puts it, even if the statute is "gender-based," it is not "gender-biased." *Ibid.*

We are not persuaded by this analysis. For mothers who are the primary providers for their families, and who are unemployed, § 407 is obviously gender biased, for it deprives them and their families of benefits solely on the basis of their sex. The Secretary's argument, at bottom, turns on the fact that the impact of the gender qualification is felt by family units rather than individuals. But this Court has not hesitated to strike down gender classifications that result in benefits being granted or denied to family units on the basis of the sex of the qualifying parent. See *Frontiero* v. *Richardson,* 411 U. S. 677 (1973) (military quarters allowances and medical and dental benefits); *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975) (survivor's benefits); *Califano* v. *Goldfarb,* 430 U. S. 199 (1977) (survivor's benefits); *Califano* v. *Jablon,* 430 U. S. 924 (1977), summarily aff'g 399 F. Supp. 118 (Md. 1975) (spousal benefits). Here, as in those cases, the statute "discriminates against one particular category of family—that in which the female spouse is a wage earner." *Goldfarb,* 430 U. S., at 209 (plurality opinion).

The Secretary appears to acknowledge the force of these precedents, but suggests that each involved benefits that either were a form of compensation earned by a woman as a member of the labor force, or were directly related to such compensation. In the present case, in contrast, the benefits are part of a noncontributory welfare program. Thus, the Secretary argues, the gender qualification of § 407 is distinguishable from those contained in the earlier cases, for it does not denigrate "the efforts of women who do work and whose earnings contribute significantly to their families' support." *Wiesenfeld,* 420 U. S., at 645.

The distinction between employment-related benefits and other forms of government largesse may be relevant to equal

protection analysis, for example in determining whether the differential treatment of survivor's benefits denigrates the efforts of the deceased spouse. *Wiesenfeld,* 420 U. S., at 645–647; *Goldfarb,* 430 U. S., at 206–207 (plurality opinion). This does not mean, however, that the Constitution is indifferent to a statute that conditions the availability of noncontributory welfare benefits on the basis of gender. The Secretary's argument to the contrary in effect invites a return to the discredited view that welfare benefits are a "privilege" not subject to the guarantee of equal protection. See *Graham* v. *Richardson,* 403 U. S. 365, 374 (1971). Putting labels aside, the exclusion here is if anything more pernicious than those in *Frontiero, Wiesenfeld,* and *Goldfarb.* AFDC–UF benefits are not "fringe benefits," nor are they a type of social assistance paid without regard to need. Rather, they are subsistence payments made available as a last resort to families that would otherwise lack basic necessities. The deprivation imposed by § 407, moreover, is not a mere procedural barrier, like the proof-of-dependency requirement in *Frontiero* and *Goldfarb,* but is an absolute bar to qualification for aid. We therefore reject the contention that the classification imposed by § 407 does not discriminate on the basis of gender.

B

The Secretary next argues that the gender distinction imposed by § 407 survives constitutional scrutiny because it is substantially related to achievement of an important governmental objective. *Orr* v. *Orr,* 440 U. S. 268, 279 (1979); *Califano* v. *Webster,* 430 U. S. 313, 316–317 (1977); *Craig* v. *Boren,* 429 U. S. 190, 197 (1976). The Secretary identifies two important objectives served by § 407.

First and most obviously, the statute was intended to provide aid for children deprived of basic sustenance because of a parent's unemployment. H. R. Rep. No. 28, 87th Cong., 1st Sess., 2 (1961). As then HEW Secretary Ribicoff put it in

testimony before the House Ways and Means Committee, "there is no justification whatsoever for denying to the child of the unemployed parent the food that you give to the child of the parent who deserts or is absent or dead." Hearings on H. R. 3864 and 3865 before the House Committee on Ways and Means, 87th Cong., 1st Sess., 102 (1961). The appellant Secretary does not contend, however, that the gender qualification of § 407 serves to achieve this goal. Tr. of Oral Arg. 6, 7–8. Nor could he, since families where the mother is the principal wage earner and is unemployed are often in as much need of AFDC–UF benefits and Medicaid as families where the father is unemployed.

Second, the statute was designed to remedy a structural fault in the original AFDC program. Under that program, a family was eligible for benefits if deprived of parental support because of the "continued absence from the home . . . of a parent." 42 U. S. C. § 606 (a). In times of economic adversity, this provision was thought to create an incentive for the father to desert, or to pretend to desert, in order to make the family eligible for assistance. Section 407, by providing AFDC benefits to families rendered needy by parental unemployment, was intended to reduce this incentive and thereby promote the goal of family stability. The Secretary submits that reducing the incentive for the father to desert was an important objective of the AFDC–UF program, and he argues that the gender qualification is substantially related to its achievement.

We perceive, however, at least two flaws in this argument. Although it is relatively clear that Congress was concerned about the problem of parental desertion, see S. Rep. No. 744, 90th Cong., 1st Sess., 160 (1967); H. R. Rep. No. 28, 87th Cong., 1st Sess., 2 (1961), there is no evidence that the gender distinction was designed to address this problem. See *Weinberger* v. *Wiesenfeld*, 420 U. S., at 648. Both the original AFDC program, and the temporary versions of the AFDC–UF

program enacted in 1961 and 1962, were gender neutral. The gender qualification added to the permanent version of AFDC–UF in 1968 escaped virtually unnoticed in the hearings and floor debates.[5] The only explanation for this addition is contained in the following passage, which appears in nearly identical form in both the House and Senate Reports:

> "This program was originally conceived by Congress as one to provide aid for the children of unemployed fathers. However, some States make families in which the father is working but the mother is unemployed eligible for assistance. The bill would not allow such situations. Under the bill, the program could apply only to the children of unemployed fathers." S. Rep. No. 744, at 160.

See also H. R. Rep. No. 554, 90th Cong., 1st Sess., 108 (1967).

This suggests that the gender qualification was part of the general objective of the 1968 amendments to tighten standards for eligibility and reduce program costs.[6] Congress was concerned that certain States were making AFDC–UF assistance available to families where the mother was out of work, but the father remained fully employed and able to support

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[5] During the Senate floor debate on the Conference Report, Senator Muskie briefly noted and opposed the gender limitation of § 407. 113 Cong. Rec. 36914 (1967).

[6] The overriding purpose of the 1968 AFDC amendments was "[t]o give greater emphasis to getting appropriate members of families drawing aid to families with dependent children (AFDC) payments into employment and thus no longer dependent on the welfare rolls." H. R. Rep. No. 544, 90th Cong., 1st Sess., 3 (1967). The principal changes in the AFDC–UF program designed to accomplish this end included provisions "to authorize a Federal definition of unemployment by the Secretary (but within certain limits set forth in the legislation), to tie the program more closely to the work and training program authorized by the bill, and to protect only the children of unemployed fathers who have had a recent attachment to the work force." *Id.*, at 108.

the family. Apparently, Congress was not similarly concerned about States making benefits available where the father was out of work, but the mother remained fully employed. From all that appears, Congress, with an image of the "traditional family" in mind, simply assumed that the father would be the family breadwinner, and that the mother's employment role, if any, would be secondary. In short, the available evidence indicates that the gender distinction was inserted to reduce costs and eliminate what was perceived to be a type of superfluous eligibility for AFDC–UF benefits. There is little to suggest that the gender qualification had anything to do with reducing the father's incentive to desert.[7]

Even if the actual purpose of the gender qualification was to deal with the problem of paternal desertion, it does not appear that the classification is substantially related to the achievement of that goal. The Secretary argues there is "[s]olid statistical evidence" that fathers are more susceptible to pressure to desert than mothers, and thus that Congress was justified in excluding families headed by unemployed mothers from the AFDC–UF program. Brief for Appellant in No. 78–437, p. 33. We may assume, for purposes of discussion, that Congress could legitimately view paternal desertion as a problem separate and distinct from maternal desertion. Even so, the gender qualification of § 407 is not substantially related to the stated purpose. There is no evidence, in the legislative history or elsewhere, that a father has less incentive to desert in a family where the mother is the breadwinner and becomes unemployed, than in a family where the father is the breadwinner and becomes unemployed. In either case, the family's need will be equally great, and the father will be equally subject to pressure to leave the home to make the

[7] This conclusion is reinforced by the fact that both the House and Senate Reports included material dealing specifically with the problem of parental desertion, yet none of this material mentioned the gender qualification of § 407. H. R. Rep. No. 544, 90th Cong., 1st Sess., 102–103 (1967); S. Rep. No. 744, 90th Cong., 1st Sess., 160–163 (1967).

family eligible for benefits. The Secretary urges that Congress could take "one firm step" toward the goal of eliminating the incentive to desert, quoting *Califano* v. *Jobst,* 434 U. S. 47, 57–58 (1977). But Congress may not legislate "one step at a time" when that step is drawn along the line of gender, and the consequence is to exclude one group of families altogether from badly needed subsistence benefits. Cf. *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955).

We conclude that the gender classification of § 407 is not substantially related to the attainment of any important and valid statutory goals. It is, rather, part of the "baggage of sexual stereotypes," *Orr* v. *Orr,* 440 U. S., at 283, that presumes the father has the "primary responsibility to provide a home and its essentials," *Stanton* v. *Stanton,* 421 U. S. 7, 10 (1975), while the mother is the " 'center of home and family life.' " *Taylor* v. *Louisiana,* 419 U. S. 522, 534 n. 15 (1975). Legislation that rests on such presumptions, without more, cannot survive scrutiny under the Due Process Clause of the Fifth Amendment.

III

THE COMMISSIONER'S APPEAL

A

"Where a statute is defective because of underinclusion," Mr. Justice Harlan noted, "there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Welsh* v. *United States,* 398 U. S. 333, 361 (1970) (concurring in result). In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course. See, *e. g., Jimenez* v. *Weinberger,* 417 U. S. 628, 637–638 (1974); *Frontiero* v. *Richardson,* 411 U. S., at 691 and n. 25 (plurality opinion). Indeed,

this Court regularly has affirmed District Court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class. *E. g., Califano* v. *Goldfarb,* 430 U. S. 199 (1977), aff'g 396 F. Supp. 308, 309 (EDNY 1975); *Califano* v. *Silbowitz,* 430 U. S. 924 (1977), summarily aff'g 397 F. Supp. 862, 871 (SD Fla. 1975); *Jablon* v. *Califano,* 430 U. S. 924 (1977), summarily aff'g 399 F. Supp. 118, 132–133 (Md. 1975); *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975), aff'g 367 F. Supp. 981, 991 (NJ 1973); *United States Dept. of Agriculture* v. *Moreno,* 413 U. S. 528 (1973), aff'g 345 F. Supp. 310, 315–316 (DC 1972); *Richardson* v. *Griffin,* 409 U. S. 1069 (1972), summarily aff'g 346 F. Supp. 1226, 1237 (Md.).

The District Court ordered extension rather than invalidation by way of remedy here, and equitable considerations surely support its choice. Approximately 300,000 needy children currently receive AFDC–UF benefits, see 42 Soc. Sec. Bull. 78 (Jan. 1979), and an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect. The presence in the Social Security Act of a strong severability clause, 42 U. S. C. § 1303,[8] likewise counsels against nullification, for it evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse.

There is no need, however, to elaborate here the conditions under which invalidation rather than extension of an underinclusive federal benefits statute should be ordered, for no party has presented that issue for review. All parties before the District Court agreed that extension was the appropriate remedy. Juris. Statement in No. 78–689, p. 6; Motion to Affirm 5; Juris. Statement in No. 78–437, p. 6 n. 5. Appellees

[8] "If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 42 U. S. C. § 1303.

support that remedy here, and the Secretary, while arguing in favor of § 407's constitutionality, urges that, if the statute is invalidated, the District Court's remedy should be affirmed. Brief for Federal Appellee in No. 78–689, pp. 5–10. The Commissioner likewise argues that extension, rather than nullification, is proper, Tr. of Oral Arg. 18; indeed, the Commissioner did not appeal from the District Court's April 20 extension order, but only from its August 9 refusal to limit extension along "principal wage-earner" lines. App. to Juris. Statement in No. 78–689, p. 15a. Since no party has presented the issue of extension versus nullification for review, we would be inclined to consider it only if the power to order extension were clearly beyond the constitutional competence of a federal district court. This Court's previous decisions, however, which routinely have affirmed District Court judgments ordering extension of federal welfare programs, suggest strongly that no such remedial incapacity exists.

B

The narrower question presented by the Commissioner's appeal concerns not the merits of extension versus nullification, but rather the form that extension should take. The District Court ordered that benefits be paid to families in which either the mother or the father is unemployed within the meaning of the Act. The Commissioner agrees that either the mother's or the father's unemployment should be able to qualify a needy family for benefits, but proposes to award them only if the parent in question can show that he or she is *both* unemployed *and* the family's "principal wage-earner." Citing the legislative history of the AFDC–UF program, the Commissioner argues that his proposed remedy comports with Congress' intent to aid families made needy by their *breadwinner's* unemployment. This argument, as the preceding portions of this opinion show, is not without force. We may assume *arguendo* that, if Congress knew in 1968 what it knows now, it might well have adopted the "principal wage-earner"

model suggested by the Commissioner. But this does not mean that the AFDC–UF program should be restructured along these lines by a federal court.

First, the Commissioner's proposed remedy would have the effect of *terminating* benefits to many families currently receiving them. Under the Act and implementing regulations, benefits are paid to needy families of all unemployed fathers, whether or not the father is actually the "principal wage-earner." See 42 U. S. C. § 607 (a); 45 CFR § 233.100 (a)(1) (1978). No one contends that the Act and regulations, insofar as they provide benefits to families of *all* unemployed fathers, are invalid. Absent some such showing of invalidity, we would hesitate to terminate needy families' entitlement to statutory benefits merely because the unemployed father cannot prove "breadwinner" status.

Second, the Commissioner's proposed remedy would involve a restructuring of the Act that a court should not undertake lightly. Whenever a court extends a benefits program to redress unconstitutional underinclusiveness, it risks infringing legislative prerogatives. The extension ordered by the District Court possesses at least the virtue of simplicity: by ordering that "father" be replaced by its gender-neutral equivalent, the court avoided disruption of the AFDC–UF program, for benefits simply will be paid to families with an unemployed parent on the same terms that benefits have long been paid to families with an unemployed father. The "principal wage-earner" solution, by contrast, would introduce a term novel in the AFDC scheme,[9] and would pose definitional and policy questions best suited to legislative or administrative elaboration. The Commissioner, with his "principal wage-earner" gloss on parental unemployment, in essence asks this Court to redefine "unemployment" within the meaning of the

[9] The Act, for example, provides benefits to two-parent families made needy by the incapacity of either parent, regardless of which parent may have been the "principal wage-earner." 42 U. S. C. § 606 (a).

Act. Yet "Congress in § 407 (a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes 'unemployment' for purposes of AFDC–UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term." *Batterton* v. *Francis*, 432 U. S., at 425 (emphasis in original).

The remedy the Commissioner proposes, of course, undeniably would be cheaper than the remedy the District Court decreed, in part because it would terminate some current recipients' eligibility. Although cost may prove a dispositive factor in other contexts, we do not regard it as controlling here. The United States, which will bear the main burden of added coverage through federal matching grants, urges that the District Court's remedy be affirmed. The AFDC–UF program, furthermore, is optional with the States, *id.*, at 431, and any State is free to drop out of it if dissatisfied with the added expense. This Court, in any event, is ill-equipped both to estimate the relative costs of various types of coverage, and to gauge the effect that different levels of expenditures would have upon the alleviation of human suffering. Under these circumstances, any fine-tuning of AFDC coverage along "principal wage-earner" lines is properly left to the democratic branches of the Government. In sum, we believe the District Court, in an effort to render the AFDC–UF program gender neutral, adopted the simplest and most equitable extension possible.

The judgment of the District Court accordingly is affirmed.

It is so ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I agree with the Court that § 407 violates the equal protection component of the Fifth Amendment. In my view, how-

ever, the court below erred when it ordered the extension of benefits to all families in which a mother has become unemployed. This extension reinstates a system of distributing benefits that Congress rejected when it amended § 407 in 1968. Rather than frustrate the clear intent of Congress, the court simply should have enjoined any further payment of benefits under the provision found to be unconstitutional.

As Mr. Justice Harlan observed:

> "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (concurring in result).

In choosing between these alternatives, a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole. See *id.*, at 365–366, and n. 18. It should not use its remedial powers to circumvent the intent of the legislature.

The Court correctly observes that "the gender qualification [of § 407] was part of the general objective of the 1968 amendments to tighten standards for eligibility and reduce program costs." *Ante*, at 87. It is clear that Congress intended to proscribe the payment of benefits to families where only one parent was unemployed and where the principal wage earner continued to work.

> "From all that appears, Congress, with an image of the 'traditional family' in mind, simply assumed that the father would be the family breadwinner, and that the mother's employment role, if any, would be secondary." *Ante*, at 88.

Yet the result of the Court's decision affirming the District

Court's relief is to compel exactly the extension of benefits Congress wished to prevent.[1]

Rather than thus rewriting § 407, we should leave this task to Congress. Now that we have held that this statute constitutes impermissible gender-based discrimination, it is the duty and function of the Legislative Branch to review its AFDC-UF program in light of our decision and make such changes therein as it deems appropriate. Leaving the resolution to Congress is especially desirable in cases such as this one, where the allocation and distribution of welfare funds are peculiarly within the province of the Legislative Branch. See *Califano* v. *Jobst*, 434 U. S. 47 (1977); *Maher* v. *Roe*, 432 U. S. 464, 479 (1977); *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

We cannot predict what Congress will think to be in the best interest of its total welfare program. The extension of AFDC benefits to families suffering only from unemployment was a relatively recent development in the history of the program, a development that Congress made permanent only on the understanding that payments could be limited to cases where the principal wage earner was out of work. We cannot assume that Congress in 1968 would have approved this exten-

[1] The relief that perhaps would best approximate what Congress appears to have intended would limit payment of benefits to those families in which the principal wage earner, regardless of gender, has become unemployed. But this approach presents several difficulties, as the Court demonstrates. *Ante*, at 91–93. Under these circumstances, the modification of the order sought by appellant in No. 78–689 properly was rejected.

The Court suggests that payments to families where a breadwinner remains employed are not inconsistent with the Act, because in cases where a parent becomes incapacitated, benefits are paid regardless of the other parent's employment status or history. 42 U. S. C. § 606 (a); see *ante*, at 92 n. 9. This overlooks the special circumstances involved when a parent suffers from an incapacity. In such cases, the family usually must bear not only the costs of income lost through the one parent's unemployment, but also medical and other expenses resulting from the disability that often are quite substantial.

sion if it had known that ultimately payments would be made whenever either parent became unemployed. Nor can we assume that Congress now would adopt such a system in light of the Court's ruling that § 407 is invalid.

The Court emphasizes the hardships that may be caused by enjoining the program until Congress can act. There is the possibility, not mentioned by the Court, that other hardships might be occasioned in the allocating of limited funds as a result of court-ordered extension of these particular benefits. In any event, Congress has the option to mitigate hardships by providing promptly for retroactive payments. An injunction prohibiting further payments at least will conserve the funds appropriated until Congress determines which group, if any, it does want to assist. The relief ordered by the Court today, in contrast, ensures the irretrievable payment of funds to a class of recipients Congress did not wish to benefit.[2]

Because it is clear that Congress intended to prevent the result mandated today, and that the re-examination of § 407 required under our decision properly should be made by Congress, I dissent.

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[2] The fact that none of the parties here has sought this step, a point which the Court emphasizes, is irrelevant. This issue should turn on the intent of Congress, not the interests of the parties. A court no less is "infringing legislative prerogatives," *ante*, at 92, when it acts at the behest of the particular litigants before it, than when it chooses a remedy on its own initiative.

Syllabus

SMITH, JUDGE, ET AL. *v.* DAILY MAIL PUBLISHING CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 78–482. Argued March 20, 1979—Decided June 26, 1979

Respondent newspapers published articles containing the name of a juvenile who had been arrested for allegedly killing another youth. Respondents learned of the event and the name of the alleged assailant by monitoring the police band radio frequency and by asking various eyewitnesses. Respondents were indicted for violating a West Virginia statute which makes it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender. The West Virginia Supreme Court of Appeals granted a writ of prohibition against petitioners, the prosecuting attorney and the Circuit Judges of Kanawha County, W. Va., holding that the statute on which the indictment was based violated the First and Fourteenth Amendments.

Held: The State cannot, consistent with the First and Fourteenth Amendments, punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper. The asserted state interest in protecting the anonymity of the juvenile offender to further his rehabilitation cannot justify the statute's imposition of criminal sanctions for publication of a juvenile's name lawfully obtained. Pp. 101–106.

(a) Whether the statute is viewed as a prior restraint by authorizing the juvenile judge to permit publication or as a penal sanction for publishing lawfully obtained, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. When a state attempts to punish publication after the event it must demonstrate that its punitive action was necessary to further the state interests asserted. *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829. Pp. 101–104.

(b) Respondents' First Amendment rights prevail over the State's interest in protecting juveniles. Cf. *Davis* v. *Alaska*, 415 U. S. 308. Even assuming that the statute served a state interest of the highest order, the statute does not accomplish its stated purpose since it does not restrict the electronic media or any form of publication, except "newspapers." Pp. 104–105.

— W. Va. —, 248 S. E. 2d 269, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, *post*, p. 106. POWELL, J., took no part in the consideration or decision of the case.

Cletus B. Hanley, Special Assistant Attorney General of West Viriginia, argued the cause for petitioners. With him on the brief were *Chauncey H. Browning*, Attorney General, and *Betty L. Caplan*, Special Assistant Attorney General.

Floyd Abrams argued the cause for respondents. With him on the brief were *Dean Ringel*, *F. Paul Chambers*, *Michael A. Albert*, and *Rudolph L. Di Trapano*.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether a West Virginia statute violates the First and Fourteenth Amendments of the United States Constitution by making it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender.

(1)

The challenged West Virginia statute provides:

> "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court. . . ." W. Va. Code § 49–7–3 (1976);

and:

> "A person who violates . . . a provision of this chapter for which punishment has not been specifically provided,

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**Paul Raymond Stone* filed a brief for the Juvenile Defender Attorney Program et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Bruce J. Ennis* for the American Civil Liberties Union; by *Arthur B. Hanson* and *Frank M. Northam* for the American Newspaper Publishers Association; by

> shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment." § 49–7–20.

On February 9, 1978, a 15-year-old student was shot and killed at Hayes Junior High School in St. Albans, W. Va., a small community located about 13 miles outside of Charleston, W. Va. The alleged assailant, a 14-year-old classmate, was identified by seven different eyewitnesses and was arrested by police soon after the incident.

The Charleston Daily Mail and the Charleston Gazette, respondents here, learned of the shooting by monitoring routinely the police band radio frequency; they immediately dispatched reporters and photographers to the junior high school. The reporters for both papers obtained the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecuting attorney who were at the school.

The staffs of both newspapers prepared articles for publication about the incident. The Daily Mail's first article appeared in its February 9 afternoon edition. The article did not mention the alleged attacker's name. The editorial decision to omit the name was made because of the statutory prohibition against publication without prior court approval.

The Gazette made a contrary editorial decision and published the juvenile's name and picture in an article about the shooting that appeared in the February 10 morning edition of the paper. In addition, the name of the alleged juvenile attacker was broadcast over at least three different radio stations on February 9 and 10. Since the information had be-

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Richard M. Schmidt, Jr., and *Ian D. Volner* for the American Society of Newspaper Editors et al.; and by *Don H. Reuben, Lawrence Gunnels,* and *James A. Klenk* for the Chicago Tribune Co.

come public knowledge, the Daily Mail decided to include the juvenile's name in an article in its afternoon paper on February 10.

On March 1, an indictment against the respondents was returned by a grand jury. The indictment alleged that each knowingly published the name of a youth involved in a juvenile proceeding in violation of W. Va. Code § 49–7–3 (1976). Respondents then filed an original-jurisdiction petition with the West Virginia Supreme Court of Appeals, seeking a writ of prohibition against the prosecuting attorney and the Circuit Court Judges of Kanawha County, petitioners here. Respondents alleged that the indictment was based on a statute that violated the First and Fourteenth Amendments of the United States Constitution and several provisions of the State's Constitution and requested an order prohibiting the county officials from taking any action on the indictment.

The West Virginia Supreme Court of Appeals issued the writ of prohibition. — W. Va. —, 248 S. E. 2d 269 (1978). Relying on holdings of this Court, it held that the statute abridged the freedom of the press. The court reasoned that the statute operated as a prior restraint on speech and that the State's interest in protecting the identity of the juvenile offender did not overcome the heavy presumption against the constitutionality of such prior restraints.

We granted certiorari. 439 U. S. 963 (1978).

(2)

Respondents urge this Court to hold that because § 49–7–3 requires court approval prior to publication of the juvenile's name it operates as a "prior restraint" on speech.[1] See *Ne-*

[1] Respondents do not argue that the statute is a prior restraint because it imposes a criminal sanction for certain types of publication. At page 11 of their brief they state: "The statute in question is, to be sure, not a prior restraint because it subjects newspapers to criminal punishments for what they print" after the event.

So far as the Daily Mail was concerned, the statute operated as a deter-

braska Press Assn. v. *Stuart*, 427 U. S. 539 (1976); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). Respondents concede that this statute is not in the classic mold of prior restraint, there being no prior injunction against publication. Nonetheless, they contend that the prior-approval requirement acts in "operation and effect" like a licensing scheme and thus is another form of prior restraint. See *Near* v. *Minnesota ex rel. Olson*, *supra*, at 708. As such, respondents argue, the statute bears "a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin* v. *Keefe*, *supra*, at 419. They claim that the State's interest in the anonymity of a juvenile offender is not sufficient to overcome that presumption.

Petitioners do not dispute that the statute amounts to a prior restraint on speech. Rather, they take the view that even if it is a prior restraint the statute is constitutional because of the significance of the State's interest in protecting the identity of juveniles.

(3)

The resolution of this case does not turn on whether the statutory grant of authority to the juvenile judge to permit publication of the juvenile's name is, in and of itself, a prior restraint. First Amendment protection reaches beyond prior restraints, *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), and respondents acknowledge that the statutory provision for court approval of disclosure actually may have a less oppressive effect on freedom of the press than a total ban on the publication of the child's name.

Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful in-

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rent for 24 hours and became the basis for a prosecution after the delayed publication.

formation is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases. See *Nebraska Press Assn.* v. *Stuart, supra,* at 561; *Organization for a Better Austin* v. *Keefe, supra,* at 419; *Near* v. *Minnesota ex rel. Olson, supra,* at 716. See also *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546 (1975). However, even when a state attempts to punish publication after the event it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted. *Landmark Communications, Inc.* v. *Virginia, supra,* at 843. Since we conclude that this statute cannot satisfy the constitutional standards defined in *Landmark Communications, Inc.,* we need not decide whether, as argued by respondents, it operated as a prior restraint.

Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards. In *Landmark Communications* we declared unconstitutional a Virginia statute making it a crime to publish information regarding confidential proceedings before a state judicial review commission that heard complaints about alleged disabilities and misconduct of state-court judges. In declaring that statute unconstitutional, we concluded:

> "[T]he publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." 435 U. S., at 838.

In *Cox Broadcasting Corp.* v. *Cohn, supra,* we held that damages could not be recovered against a newspaper for publishing the name of a rape victim. The suit had been based on a state statute that made it a crime to publish the name of the victim; the purpose of the statute was

to protect the privacy right of the individual and the family. The name of the victim had become known to the public through official court records dealing with the trial of the rapist. In declaring the statute unconstitutional, the Court, speaking through MR. JUSTICE WHITE, reasoned:

> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. . . . States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." 420 U. S., at 495.

One case that involved a classic prior restraint is particularly relevant to our inquiry. In *Oklahoma Publishing Co.* v. *District Court,* 430 U. S. 308 (1977), we struck down a state-court injunction prohibiting the news media from publishing the name or photograph of an 11-year-old boy who was being tried before a juvenile court. The juvenile court judge had permitted reporters and other members of the public to attend a hearing in the case, notwithstanding a state statute closing such trials to the public. The court then attempted to halt publication of the information obtained from that hearing. We held that once the truthful information was "publicly revealed" or "in the public domain" the court could not constitutionally restrain its dissemination.

None of these opinions directly controls this case; however, all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. These cases involved situations where the government itself provided or made possible press access to the information. That factor is not controlling. Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant.

A free press cannot be made to rely solely upon the sufferance of government to supply it with information. See *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 11 (1978) (plurality opinion); *Branzburg* v. *Hayes*, 408 U. S. 665, 681 (1972). If the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here.

(4)

The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense. In *Davis* v. *Alaska*, 415 U. S. 308 (1974), similar arguments were advanced by the State to justify not permitting a criminal defendant to impeach a prosecution witness on the basis of his juvenile record. We said there that "[w]e do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender." *Id.*, at 319. However, we concluded that the State's policy must be subordinated to the defendant's Sixth Amendment right of confrontation. *Ibid.* The important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment. See *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 561. Therefore, the reasoning of *Davis* that the constitutional right must prevail over the state's interest in protecting juveniles applies with equal force here.

The magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to respondents. Moreover, the statute's approach does not satisfy constitutional requirements. The statute does not restrict

the electronic media or any form of publication, except "newspapers," from printing the names of youths charged in a juvenile proceeding. In this very case, three radio stations announced the alleged assailant's name before the Daily Mail decided to publish it. Thus, even assuming the statute served a state interest of the highest order, it does not accomplish its stated purpose.

In addition, there is no evidence to demonstrate that the imposition of criminal penalties is necessary to protect the confidentiality of juvenile proceedings. As the Brief for Respondents points out at 29 n. **, all 50 states have statutes that provide in some way for confidentiality, but only 5, including West Virginia,[2] impose criminal penalties on nonparties for publication of the identity of the juvenile. Although every state has asserted a similar interest, all but a handful have found other ways of accomplishing the objective. See *Landmark Communications, Inc.* v. *Virginia,* 435 U. S., at 843.[3]

(5)

Our holding in this case is narrow. There is no issue before us of unlawful press access to confidential judicial proceedings, see *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S., at 496 n. 26; there is no issue here of privacy or prejudicial pretrial publicity. At issue is simply the power of a state

[2] Colo. Rev. Stat. § 19–1–107 (6) (1973); Ga. Code § 24A–3503 (g) (1) (1978); N. H. Rev. Stat. Ann. § 169:27–28 (1977); S. C. Code § 14–21–30 (1976).

[3] The approach advocated by the National Council of Juvenile Court Judges is based on cooperation between juvenile court personnel and newspaper editors. It is suggested that if the courts make clear their purpose and methods then the press will exercise discretion and generally decline to publish the juvenile's name without some prior consultation with the juvenile court judge. See Conway, Publicizing the Juvenile Court: A Public Responsibility, 16 Juv. Ct. Judges J. 21, 21–22 (1965); Riederer, Secrecy or Privacy? Communication Problems in the Juvenile Court Field, 17 J. Mo. Bar 66, 69–70 (1961).

to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper.[4] The asserted state interest cannot justify the statute's imposition of criminal sanctions on this type of publication. Accordingly, the judgment of the West Virginia Supreme Court of Appeals is

Affirmed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE REHNQUIST, concurring in the judgment.

Historically, we have viewed freedom of speech and of the press as indispensable to a free society and its government. But recognition of this proposition has not meant that the public interest in free speech and press always has prevailed over competing interests of the public. "Freedom of speech thus does not comprehend the right to speak on any subject at any time," *American Communications Assn.* v. *Douds,* 339 U. S. 382, 394 (1950), and "the press is not free to publish with impunity everything and anything it desires to publish." *Branzburg* v. *Hayes,* 408 U. S. 665, 683 (1972); see *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 708, 716 (1931). While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented. *E. g., Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829, 838, 843 (1978); *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 562 (1976); *American Communications Assn.* v. *Douds, supra,* at 400.

[4] In light of our disposition of the First and Fourteenth Amendment issue, we need not reach respondents' claim that the statute violates equal protection by being applicable only to newspapers but not other forms of journalistic expression.

The Court does not depart from these principles today. See *ante*, at 103–104. Instead, it concludes that the asserted state interest is not sufficient to justify punishment of publication of truthful, lawfully obtained information about a matter of public significance. *Ante*, at 104. So valued is the liberty of speech and of the press that there is a tendency in cases such as this to accept virtually any contention supported by a claim of interference with speech or the press. See *Jones* v. *Opelika*, 316 U. S. 584, 595 (1942). I would resist that temptation. In my view, a State's interest in preserving the anonymity of its juvenile offenders—an interest that I consider to be, in the words of the Court, of the "highest order"—far outweighs any minimal interference with freedom of the press that a ban on publication of the youths' names entails.

It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity. See H. Lou, Juvenile Courts in the United States 131–133 (1927); Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt. L. Rev. 101, 102, 116 (1958). This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and "'bury them in the graveyard of the forgotten past.'" *In re Gault*, 387 U. S. 1, 24–25 (1967). The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State. National Advisory Committee on Criminal Justice Standards and Goals, Juvenile Justice and Delinquency Prevention, Standard 5.13, pp. 224–225 (1976); see *Davis* v. *Alaska*, 415 U. S. 308, 319 (1974); *Kent* v. *United States*, 383 U. S. 541, 554–555 (1966). Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of

the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public. E. Eldefonso, Law Enforcement and the Youthful Offender 166 (3d ed. 1978). This exposure brings undue embarrassment to the families of youthful offenders and may cause the juvenile to lose employment opportunities or provide the hardcore delinquent the kind of attention he seeks, thereby encouraging him to commit further antisocial acts. *Davis* v. *Alaska*, *supra*, at 319. Such publicity also renders nugatory States' expungement laws, for a potential employer or any other person can retrieve the information the States seek to "bury" simply by visiting the morgue of the local newspaper. The resultant widespread dissemination of a juvenile offender's name, therefore, may defeat the beneficent and rehabilitative purposes of a State's juvenile court system.[1]

By contrast, a prohibition against publication of the names of youthful offenders represents only a minimal interference with freedom of the press. West Virginia's statute, like similar laws in other States, prohibits publication only of the name of the young person. See W. Va. Code § 49–7–3 (1976). The press is free to describe the details of the offense and inform the community of the proceedings against the juvenile. It is difficult to understand how publication of the youth's name is in any way necessary to performance of the press' "watch-

[1] That publicity may have a harmful impact on the rehabilitation of a juvenile offender is not mere hypothesis. Recently, two clinical psychologists conducted an investigation into the effects of publicity on a juvenile. They concluded that publicity "placed additional stress on [the juvenile] during a difficult period of adjustment in the community, and it interfered with his adjustment at various points when he was otherwise proceeding adequately." Howard, Grisso, & Neems, Publicity and Juvenile Court Proceedings, 11 Clearinghouse Rev. 203, 210 (1977). Publication of the youth's name and picture also led to confrontations between the juvenile and his peers while he was in detention. *Ibid.* While this study obviously is not controlling, it does indicate that the concerns that prompted enactment of state laws prohibiting publication of the names of juvenile offenders are not without empirical support.

dog" role. In those rare instances where the press believes it is necessary to publish the juvenile's name, the West Virginia law, like the statutes of other States, permits the juvenile court judge to allow publication. The juvenile court judge, unlike the press, is capable of determining whether publishing the name of the particular young person will have a deleterious effect on his chances for rehabilitation and adjustment to society's norms.[2]

Without providing for punishment of such unauthorized publications it will be virtually impossible for a State to ensure the anonymity of its juvenile offenders. Even if the juvenile court's proceedings and records are closed to the public, the press still will be able to obtain the child's name in the same manner as it was acquired in this case. *Ante*, at 99; Tr. of Oral Arg. 34. Thus, the Court's reference to effective alternatives for accomplishing the State's goals is a mere chimera. The fact that other States do not punish publication of the names of juvenile offenders, while relevant,

[2] The Court relies on *Davis* v. *Alaska*, 415 U. S. 308 (1974). *Ante*, at 104. But *Davis*, which presented a clash between the interests of the State in affording anonymity to juvenile offenders and the defendant's Sixth Amendment right of confrontation, does not control the disposition of this case. In *Davis*, where the defendant's liberty was at stake, the Court stated that "[s]erious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry [related to the juvenile offender's record]." 415 U. S., at 319. The State also could have protected the youth from exposure by not using him to make out its case. *Id.*, at 320. By contrast, in this case the State took every step that was in its power to protect the juvenile's name, and the minimal interference with the freedom of the press caused by the ban on publication of the youth's name can hardly be compared with the possible deprivation of liberty involved in *Davis*. Because in each case we must carefully balance the interest of the State in pursuing its policy against the magnitude of the encroachment on the liberty of speech and of the press that the policy represents, it will not do simply to say, as the Court does, that the "important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment." *Ante*, at 104.

certainly is not determinative of the requirements of the Constitution.

Although I disagree with the Court that a state statute punishing publication of the identity of a juvenile offender can never serve an interest of the "highest order" and thus pass muster under the First Amendment, I agree with the Court that West Virginia's statute "does not accomplish its stated purpose." *Ante*, at 105. The West Virginia statute prohibits only newspapers from printing the names of youths charged in juvenile proceedings. Electronic media and other forms of publication can announce the young person's name with impunity. In fact, in this case three radio stations broadcast the alleged assailant's name before it was published by the Charleston Daily Mail. *Ante*, at 99. This statute thus largely fails to achieve its purpose.[3] It is difficult to take very seriously West Virginia's asserted need to preserve the anonymity of its youthful offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment. See *Branzburg* v. *Hayes*, 408 U. S., at 700; *Bates* v. *Little Rock*, 361 U. S. 516, 525 (1960). I, therefore, join in the Court's judgment striking down the West Virginia law. But for the reasons previously stated, I think that a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional.

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[3] I believe that an obvious failure of a state statute to achieve its purpose is entitled to considerable weight in the balancing process that is employed in deciding issues arising under the First and Fourteenth Amendment protections accorded freedom of expression. But for the reasons stated in my dissent in *Trimble* v. *Gordon*, 430 U. S. 762, 777 (1977), I think a similar inquiry into whether a statute "accomplishes its purpose" is illusory when the statute is challenged on the basis of the Equal Protection Clause of the Fourteenth Amendment.

HUTCHINSON *v.* PROXMIRE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78–680. Argued April 17, 1979—Decided June 26, 1979

Respondent United States Senator publicizes examples of wasteful governmental spending by awarding his "Golden Fleece of the Month Award." One such award was given to federal agencies that had funded petitioner scientist's study of emotional behavior in which he sought an objective measure of aggression, concentrating upon the behavior patterns of certain animals. The award was announced in a speech prepared with the help of respondent legislative assistant, the text of which was incorporated in a widely distributed press release. Subsequently, the award was also referred to in newsletters sent out by the Senator, in a television interview program on which he appeared, and in telephone calls made by the legislative assistant to the sponsoring federal agencies. Petitioner sued respondents in Federal District Court for defamation, alleging, *inter alia*, that in making the award and publicizing it nationwide, respondents had damaged him in his professional and academic standing. The District Court granted summary judgment for respondents, holding that the Speech or Debate Clause afforded absolute immunity for investigating the funding of petitioner's research, for the speech in the Senate, and for the press release, since it fell within the "informing function" of Congress. The court further held that petitioner was a "public figure" for purposes of determining respondents' liability; that respondents were protected by the First Amendment thereby requiring petitioner to prove "actual malice"; and that based on the depositions, affidavits, and pleadings there was no genuine issue of material fact on the issue of actual malice, neither respondents' failure to investigate nor unfair editing and summarizing being sufficient to establish "actual malice." Finally, the court held that even if petitioner were found to be a "private person," relevant state law required a summary judgment for respondents. The Court of Appeals affirmed, holding that the Speech or Debate Clause protected the statements made in the press release and newsletters and that, although the followup telephone calls and the statements made on television were not protected by that Clause, they were protected by the First Amendment, since petitioner was a "public figure," and that on the record there was no showing of "actual malice."

Held:

1. While this Court's practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available, special considerations in this case mandate that the constitutional questions first be resolved. If respondents have immunity under the Speech or Debate Clause, no other questions need be considered. And where it appears that the Court of Appeals would not affirm the District Court's state-law holding so that the appeal could not be decided without reaching the First Amendment issue, that issue will also be reached here. Pp. 122–123.

2. The Speech or Debate Clause does not protect transmittal of information by individual Members of Congress by press releases and newsletters. Pp. 123–133.

(a) There is nothing in the history of the Clause or its language suggesting any intent to create an absolute privilege from liability or suit for defamatory statements made outside the legislative Chambers; precedents support the conclusion that a Member may be held liable for republishing defamatory statements originally made in the Chamber. Pp. 127–130.

(b) Neither the newsletters nor the press release here was "essential to the deliberation of the Senate" and neither was part of the deliberative process. *Gravel* v. *United States*, 408 U. S. 606; *Doe* v. *McMillan*, 412 U. S. 306. P. 130.

(c) The newsletters and press release were not privileged as part of the "informing function" of Members of Congress to tell the public about their activities. Individual Members' transmittal of information about their activities by press releases and newsletters is not part of the legislative function or the deliberations that make up the legislative process; in contrast to voting and preparing committee reports, which are part of Congress' function to inform itself, newsletters and press releases are primarily means of informing those outside the legislative forum and represent the views and will of a single Member. *Doe* v. *McMillan*, *supra*, distinguished. Pp. 132–133.

3. Petitioner is not a "public figure" so as to make the "actual malice" standard of proof of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, applicable. Neither the fact that local newspapers reported the federal grants to petitioner for his research nor the fact that he had access to the news media as shown by reports of his response to the announcement of the Golden Fleece Award, demonstrates that he was a public figure prior to the controversy engendered by that award. His access, such as it was, came after the alleged libel and was limited to responding to the announcement of the award. Those charged with alleged defamation cannot, by their own conduct, create their own defense by making

the claimant a public figure. Nor is the concern about public expenditures sufficient to make petitioner a public figure, petitioner at no time having assumed any role of public prominence in the broad question of such concern. Pp. 133–136.

579 F. 2d 1027, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in all but n. 10 of which STEWART, J., joined. STEWART, J., filed a statement concurring in part and dissenting in part, *post*, p. 136. BRENNAN, J., filed a dissenting opinion, *post*, p. 136.

Michael E. Cavanaugh argued the cause and filed briefs for petitioner.

Alan Raywid argued the cause and filed a brief for respondents.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 439 U. S. 1066 (1979), to resolve three issues: (1) Whether a Member of Congress is protected by the Speech or Debate Clause of the Constitution, Art. I, § 6, against suits for allegedly defamatory statements made by the Member in press releases and newsletters; (2) whether petitioner Hutchinson is either a "public figure" or a "public official," thereby making applicable the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); and (3) whether respondents were entitled to summary judgment.

**Bruce J. Montgomery* and *John D. Lane* filed a brief for the American Psychological Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Richard M. Schmidt, Jr.*, for the American Society of Newspaper Editors et al.; and by *Chester H. Smith* for Warren G. Magnuson et al.

Stanley M. Brand filed a brief for Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives, et al. as *amici curiae*.

Ronald Hutchinson, a research behavioral scientist, sued respondents, William Proxmire, a United States Senator, and his legislative assistant, Morton Schwartz, for defamation arising out of Proxmire's giving what he called his "Golden Fleece" award. The "award" went to federal agencies that had sponsored Hutchinson's research. Hutchinson alleged that in making the award and publicizing it nationwide, respondents had libeled him, damaging him in his professional and academic standing, and had interfered with his contractual relations. The District Court granted summary judgment for respondents and the Court of Appeals affirmed.

We reverse and remand to the Court of Appeals for further proceedings consistent with this opinion.

I

Respondent Proxmire is a United States Senator from Wisconsin. In March 1975, he initiated the "Golden Fleece of the Month Award" to publicize what he perceived to be the most egregious examples of wasteful governmental spending. The second such award, in April 1975, went to the National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research, for spending almost half a million dollars during the preceding seven years to fund Hutchinson's research.[1]

At the time of the award, Hutchinson was director of research at the Kalamazoo State Mental Hospital. Before that he had held a similar position at the Ft. Custer State Home. Both the hospital and the home are operated by the Michigan State Department of Mental Health; he was therefore a state employee in both positions. During most of the period in question he was also an adjunct professor at Western Michigan University. When the research department at Kalama-

[1] There is disagreement over the actual total. The speech said the total was "over $500,000." In preparation for trial, both sides have offered higher estimates of the total amount.

zoo State Mental Hospital was closed in June 1975, Hutchinson became research director of the Foundation for Behavioral Research, a nonprofit organization. The research funding was transferred from the hospital to the foundation.

The bulk of Hutchinson's research was devoted to the study of emotional behavior. In particular, he sought an objective measure of aggression, concentrating upon the behavior patterns of certain animals, such as the clenching of jaws when they were exposed to various aggravating stressful stimuli.[2] The National Aeronautics and Space Agency and the Navy were interested in the potential of this research for resolving problems associated with confining humans in close quarters for extended periods of time in space and undersea exploration.

The Golden Fleece Award to the agencies that had sponsored Hutchinson's research was based upon research done for Proxmire by Schwartz. While seeking evidence of wasteful governmental spending, Schwartz read copies of reports that Hutchinson had prepared under grants from NASA. Those reports revealed that Hutchinson had received grants from the Office of Naval Research, the National Science Foundation, and the Michigan State Department of Mental Health. Schwartz also learned that other federal agencies had funded Hutchinson's research. After contacting a number of federal and state agencies, Schwartz helped to prepare a speech for Proxmire to present in the Senate on April 18, 1975; the text was then incorporated into an advance press release, with only

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[2] Reports of Hutchinson's research were published in scientific journals. The research is not unlike the studies of primates reported in less technical periodicals such as the National Geographic. *E. g.*, Fossey, More Years with Mountain Gorillas, 140 National Geographic 574 (1971); Galdikas-Brindamour, Orangutans, Indonesia's "People of the Forest," 148 National Geographic 444 (1975); Goodall, Life and Death at Gombe, 155 National Geographic 592 (1979); Goodall, My Life Among Wild Chimpanzees, 124 National Geographic 272 (1963); Strum, Life With the "Pumphouse Gang": New Insights into Baboon Behavior, 147 National Geographic 672 (1975).

the addition of introductory and concluding sentences. Copies were sent to a mailing list of 275 members of the news media throughout the United States and abroad.

Schwartz telephoned Hutchinson before releasing the speech to tell him of the award; Hutchinson protested that the release contained an inaccurate and incomplete summary of his research. Schwartz replied that he thought the summary was fair.

In the speech, Proxmire described the federal grants for Hutchinson's research, concluding with the following comment: [3]

> "The funding of this nonsense makes me almost angry enough to scream and kick or even clench my jaw. It seems to me it is outrageous.
>
> "Dr. Hutchinson's studies should make the taxpayers as well as his monkeys grind their teeth. In fact, the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer.
>
> "It is time for the Federal Government to get out of this 'monkey business.' In view of the transparent worthlessness of Hutchinson's study of jaw-grinding and biting by angry or hard-drinking monkeys, it is time we put a stop to the bite Hutchinson and the bureaucrats who fund him have been taking of the taxpayer." 121 Cong. Rec. 10803 (1975).

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[3] Proxmire is not certain that he actually delivered the speech on the Senate floor. He said that he might have merely inserted it into the Congressional Record. App. 220–221. In light of that uncertainty, the question arises whether a nondelivered speech printed in the Congressional Record is covered by the Speech or Debate Clause. This Court has never passed on that question and neither the District Court nor the Court of Appeals seemed to think it was important. Nevertheless, we assume, without deciding, that a speech printed in the Congressional Record carries immunity under the Speech or Debate Clause as though delivered on the floor.

In May 1975, Proxmire referred to his Golden Fleece Awards in a newsletter sent to about 100,000 people whose names were on a mailing list that included constituents in Wisconsin as well as persons in other states. The newsletter repeated the essence of the speech and the press release. Later in 1975, Proxmire appeared on a television interview program where he referred to Hutchinson's research, though he did not mention Hutchinson by name.[4]

The final reference to the research came in a newsletter in February 1976. In that letter, Proxmire summarized his Golden Fleece Awards of 1975. The letter did not mention Hutchinson's name, but it did report:

> "— The NSF, the Space Agency, and the Office of Naval Research won the 'Golden Fleece' for spending jointly $500,000 to determine why monkeys clench their jaws.
>
> . . . . .
>
> "All the studies on why monkeys clench their jaws were dropped. No more monkey business." App. 168–171.

After the award was announced, Schwartz, acting on behalf of Proxmire, contacted a number of the federal agencies that had sponsored the research. In his deposition he stated that he did not attempt to dissuade them from continuing to fund the research but merely discussed the subject.[5] Hutchinson, by contrast, contends that these calls were intended to persuade the agencies to terminate his grants and contracts.

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[4] The parties agree that Proxmire referred to research like Hutchinson's on at least one television show. They do not agree whether there were other appearances on either radio or television. Hutchinson has suggested that there were others and has produced affidavits to support his suggestion. Proxmire cannot recall any others.

[5] Senate Resolution 543, 94th Cong., 2d Sess. (1976), authorized respondents and an additional member of Proxmire's staff to give deposition testimony. 122 Cong. Rec. 29876 (1976).

II

On April 16, 1976, Hutchinson filed this suit in United States District Court in Wisconsin.[6] In Count I he alleges that as a result of the actions of Proxmire and Schwartz he has "suffered a loss of respect in his profession, has suffered injury to his feelings, has been humiliated, held up to public scorn, suffered extreme mental anguish and physical illness and pain to his person. Further, he has suffered a loss of income and ability to earn income in the future." Count II alleges that the respondents' conduct has interfered with Hutchinson's contractual relationships with supporters of his research. He later amended the complaint to add an allegation that his rights of privacy and peace and tranquility have been infringed.

Respondents moved for a change of venue and for summary judgment. In their motion for summary judgment they asserted that all of their acts and utterances were protected by the Speech or Debate Clause. In addition, they asserted that their criticism of the spending of public funds was privileged under the Free Speech Clause of the First Amendment. They argued that Hutchinson was both a public figure and a public official, and therefore would be obliged to prove the existence of "actual malice." Respondents contended that the facts of this case would not support a finding of actual malice.

Without ruling on venue, the District Court granted respondents' motion for summary judgment. 431 F. Supp. 1311 (WD Wis. 1977). In so ruling, the District Court relied on both grounds urged by respondents. It reasoned that the Speech or Debate Clause afforded absolute immunity for respondents' activities in investigating the funding of Hutchinson's research, for Proxmire's speech in the Senate, and for the press release covering the speech. The court concluded that the investigations and the speech were clearly within the

[6] On April 13, 1976, Hutchinson had written to Proxmire requesting that he retract certain erroneous statements made in the 1975 press release.

ambit of the Clause. The press release was said to be protected because it fell within the "informing function" of Congress. To support its conclusion, the District Court relied upon cases interpreting the franking privilege granted to Members by statute. See 39 U. S. C. § 3210.

Although the District Court referred to the "informing function" of Congress and to the franking privilege, it did not base its conclusion concerning the press release on those analogies. Instead, the District Court held that the "press release, in a constitutional sense, was no different than would have been a television or radio broadcast of his speech from the Senate floor." [7] 431 F. Supp., at 1325. That the District Court did not rely upon the "informing function" is clear from its implicit holding that the newsletters were not protected.

The District Court then turned to the First Amendment to explain the grant of summary judgment on the claims arising from the newsletters and interviews. It concluded that Hutchinson was a public figure for purposes of determining respondents' liability:

> "Given Dr. Hutchinson's long involvement with publicly-funded research, his active solicitation of federal and state grants, the local press coverage of his research, and the public interest in the expenditure of public funds on the precise activities in which he voluntarily participated, the court concludes that he is a public figure for the purpose of this suit. As he acknowledged in his deposition, 'Certainly, any expenditure of public funds is a matter of public interest.' " *Id.*, at 1327.[8]

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[7] Of course, in light of Proxmire's uncertainty, see n. 3, *supra*, there is no assurance that there even was a speech on the Senate floor.

[8] The District Court also concluded that Hutchinson was a "public official." 431 F. Supp., at 1327–1328. The Court of Appeals did not decide whether that conclusion was correct. 579 F. 2d 1027, 1035 n. 14 (CA7 1978). We therefore express no opinion on the issue. The Court has not provided precise boundaries for the category of "public official"; it cannot be thought to include all public employees, however.

Having reached that conclusion, the District Court relied upon the depositions, affidavits, and pleadings before it to evaluate Hutchinson's claim that respondents had acted with "actual malice." The District Court found that there was no genuine issue of material fact on that issue. It held that neither a failure to investigate nor unfair editing and summarizing could establish "actual malice." It also held that there was nothing in the affidavits or depositions of either Proxmire or Schwartz to indicate that they ever entertained any doubt about the truth of their statements. Relying upon cases from other courts, the District Court said that in determining whether a plaintiff had made an adequate showing of "actual malice," summary judgment might well be the rule rather than the exception. *Id.*, at 1330.[9]

Finally, the District Court concluded:

> "But even if for the purpose of this suit it is found that Dr. Hutchinson is a private person so that First Amendment protections do not extend to [respondents], relevant state law dictates the grant of summary judgment." *Ibid.*

The District Court held that the controlling state law was either that of Michigan or that of the District of Columbia. Without deciding which law would govern under Wisconsin's choice-of-law principles, the District Court concluded that Hutchinson would not be able to recover in either jurisdiction.

The Court of Appeals affirmed, holding that the Speech or Debate Clause protected the statements made in the press re-

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[9] Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and does not readily lend itself to summary disposition. See 10 C. Wright & A. Miller, Federal Practice and Procedure § 2730, pp. 590–592 (1973). Cf. *Herbert* v. *Lando*, 441 U. S. 153 (1979). In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

lease and in the newsletters. 579 F. 2d 1027 (CA7 1978). It interpreted *Doe* v. *McMillan*, 412 U. S. 306 (1973), as recognizing a limited protection for the "informing function" of Congress and concluded that distribution of both the press release and the newsletters did not exceed what was required for legislative purposes. 579 F. 2d, at 1033. The followup telephone calls and the statements made by Proxmire on television and radio were not protected by the Speech or Debate Clause; they were, however, held by the Court of Appeals to be protected by the First Amendment.[10] It reached that conclusion after first finding that, based on the affidavits and pleadings of record, Hutchinson was a "public figure." *Id.*, at 1034–1035. The court then examined the record to determine whether there had been a showing by Hutchinson of "actual malice." It agreed with the District Court "that, upon this record, there is no question that [respondents] did not have knowledge of the actual or probable 'falsity' of their statements." *Id.*, at 1035. The Court of Appeals also rejected Hutchinson's argument that the District Court had erred in granting summary judgment on the claimed wrongs other than defamation—interference with

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[10] Respondents did not cross petition; neither did they argue that the Speech or Debate Clause protected the followup telephone calls made by Schwartz to governmental agencies or the television and radio interviews of Proxmire. Instead, respondents relied only upon the protection afforded by the First Amendment. In light of our conclusion, *infra*, that Hutchinson is not a public figure, respondents would nevertheless be entitled to raise the Speech or Debate Clause as an alternative ground for supporting the judgment. From our conclusion, *infra*, that the Speech or Debate Clause does not protect the republication of libelous remarks, it follows that libelous remarks in the followup telephone calls to executive agencies and in the television and radio interviews are not protected. Regardless of whether and to what extent the Speech or Debate Clause may protect calls to federal agencies seeking information, it does not protect attempts to influence the conduct of executive agencies or libelous comments made during the conversations. Cf. *United States* v. *Johnson*, 383 U. S. 169, 172 (1966); *United States* v. *Brewster*, 408 U. S. 501, 512–513 (1972).

contractual relations, intentional infliction of emotional anguish, and invasion of privacy:

> "We view these additional allegations of harm as merely the results of the statements made by the defendants. If the alleged defamatory falsehoods themselves are privileged, it would defeat the privilege to allow recovery for the specified damages which they cause." *Id.*, at 1036 (footnote omitted).[11]

The Court of Appeals did not review the District Court's holding that state law also justified summary judgment for respondents.

III

The petition for certiorari raises three questions. One involves the scope of the Speech or Debate Clause; another involves First Amendment claims; a third concerns the appropriateness of summary judgment, embracing both a constitutional issue and a state-law issue. The constitutional issue arose from the District Court's view that solicitude for the First Amendment required a more hospitable judicial attitude toward granting summary judgment in a libel case. See n. 9, *supra*. The state-law issue arose because the District Court concluded that, as a matter of local law, Hutchinson could not recover.

Our practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available. See, *e. g.*, *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 193 (1909). Were we to follow that course here we would remand to the Court of Appeals to review the state-law question which it did not consider. If the District Court correctly decided the state-law question, resolution of the First Amendment issue would be unnecessary. We conclude, however, that special considerations in this case mandate that we first resolve the constitutional questions.

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[11] Petitioner has not sought review of this conclusion; we express no opinion as to its correctness.

The purpose of the Speech or Debate Clause is to protect Members of Congress "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967). See also *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491, 503 (1975). If the respondents have immunity under the Clause, no other questions need be considered for they may "not be questioned in any other Place."

Ordinarily, consideration of the constitutional issue would end with resolution of the Speech or Debate Clause question. We would then remand for the Court of Appeals to consider the issue of state law. Here, however, there is an indication that the Court of Appeals would not affirm the state-law holding. We surmise this because, in explaining its conclusion that the press release and the newsletters were protected by the Speech or Debate Clause, the Court of Appeals stated: "[T]he statements in the press release intimating that Dr. Hutchinson had made a personal fortune and that the research was 'perhaps duplicative' may be defamatory falsehoods." 579 F. 2d, at 1035 n. 15. In light of that surmise, what we said in *Wolston* v. *Reader's Digest Assn., Inc., post*, at 161 n. 2, is also appropriate here: "We assume that the Court of Appeals is as familiar as we are with the general principle that dispositive issues of statutory and local law are to be treated before reaching constitutional issues. . . . We interpret the footnote to the Court of Appeals opinion in this case, where jurisdiction is based upon diversity of citizenship, to indicate its view that . . . the appeal could not be decided without reaching the constitutional question." In light of the necessity to do so, we therefore reach the First Amendment issue as well as the Speech or Debate Clause question.

IV

In support of the Court of Appeals holding that newsletters and press releases are protected by the Speech or Debate Clause, respondents rely upon both historical precedent and

present-day congressional practices. They contend that impetus for the Speech or Debate Clause privilege in our Constitution came from the history of parliamentary efforts to protect the right of members to criticize the spending of the Crown and from the prosecution of a Speaker of the House of Commons for publication of a report outside of Parliament. Respondents also contend that in the modern day very little speech or debate occurs on the floor of either House; from this they argue that press releases and newsletters are necessary for Members of Congress to communicate with other Members. For example, in his deposition Proxmire testified:

> "I have found in 19 years in the Senate that very often a statement on the floor of the Senate or something that appears in the Congressional Record misses the attention of most members of the Senate, and virtually all members of the House, because they don't read the Congressional Record. If they are handed a news release, or something, that is going to call it to their attention . . . ." App. 220.

Respondents also argue that an essential part of the duties of a Member of Congress is to inform constituents, as well as other Members, of the issues being considered.

The Speech or Debate Clause has been directly passed on by this Court relatively few times in 190 years. *Eastland* v. *United States Servicemen's Fund, supra; Doe* v. *McMillan,* 412 U. S. 306 (1973); *Gravel* v. *United States,* 408 U. S. 606 (1972); *United States* v. *Brewster,* 408 U. S. 501 (1972); *Dombrowski* v. *Eastland, supra; United States* v. *Johnson,* 383 U. S. 169 (1966); *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881). Literal reading of the Clause would, of course, confine its protection narrowly to a "Speech or Debate *in* either House." But the Court has given the Clause a practical rather than a strictly literal reading which would limit the protection to utterances made within the four walls of either Chamber. Thus, we have held that committee hearings are protected, even if held outside the Chambers; committee reports are also pro-

tected. *Doe* v. *McMillan, supra; Gravel* v. *United States, supra.* Cf. *Coffin* v. *Coffin,* 4 Mass. *1, *27–*28 (1808).

The gloss going beyond a strictly literal reading of the Clause has not, however, departed from the objective of protecting only legislative activities. In Thomas Jefferson's view:

> "[The privilege] is restrained to things done in the House in a Parliamentary course . . . . For [the Member] is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty." T. Jefferson, A Manual of Parliamentary Practice 20 (1854), reprinted in The Complete Jefferson 704 (S. Padover ed. 1943).

One of the draftsmen of the Constitution, James Wilson, expressed a similar thought in lectures delivered between 1790 and 1792 while he was a Justice of this Court. He rejected Blackstone's statement, 1 W. Blackstone, Commentaries *164, that Parliament's privileges were preserved by keeping them indefinite:

> "Very different is the case with regard to the legislature of the United States . . . . The great maxims, upon which our law of parliament is founded, are defined and ascertained in our constitutions. The arcana of privilege, and the arcana of prerogative, are equally unknown to our system of jurisprudence." 2 J. Wilson, Works 35 (J. Andrews ed. 1896).[12]

In this respect, Wilson was underscoring the very purpose of our Constitution—*inter alia,* to provide *written* definitions of the powers, privileges, and immunities granted rather than rely on evolving constitutional concepts identified from diverse sources as in English law. Like thoughts were expressed

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[12] But see T. Jefferson, A Manual of Parliamentary Practice 15–16 (1854), reprinted in The Complete Jefferson 702 (S. Padover ed. 1943) (quoting Blackstone with approval).

by Joseph Story, writing in the first edition of his Commentaries on the Constitution in 1833:

> "But this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty." *Id.*, § 863, at 329.

Cf. *Coffin* v. *Coffin*, *supra*, at *34.

In *United States* v. *Brewster*, *supra*, we acknowledged the historical roots of the Clause going back to the long struggle between the English House of Commons and the Tudor and Stuart monarchs when both criminal and civil processes were employed by Crown authority to intimidate legislators. Yet we cautioned that the Clause

> "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. . . . [T]heir Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy." 408 U. S., at 508.

Nearly a century ago, in *Kilbourn* v. *Thompson*, *supra*, at 204, this Court held that the Clause extended "to things generally done *in a session* of the House by one of its members *in relation to the business before it.*" (Emphasis added.) More recently we expressed a similar definition of the scope of the Clause:

> "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which Members participate *in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the

> Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but 'only when necessary to prevent indirect impairment of such deliberations.'" *Gravel* v. *United States,* 408 U. S., at 625 (quoting *United States* v. *Doe,* 455 F. 2d 753, 760 (CA1 1972)) (emphasis added).

Cf. *Doe* v. *McMillan,* 412 U. S., at 313–314, 317; *United States* v. *Brewster,* 408 U. S., at 512, 515–516, 517–518; *Long* v. *Ansell,* 293 U. S. 76, 82 (1934).

Whatever imprecision there may be in the term "legislative activities," it is clear that nothing in history or in the explicit language of the Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber. In *Brewster, supra,* at 507, we observed:

> "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."

Claims under the Clause going beyond what is needed to protect legislative independence are to be closely scrutinized. In *Brewster* we took note of this:

> "The authors of our Constitution were well aware of the history of both the need for the privilege *and the abuses that could flow from too sweeping safeguards.* In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, *but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process."* 408 U. S., at 517 (emphasis added).

Indeed, the precedents abundantly support the conclusion that a Member may be held liable for republishing defamatory

statements originally made in either House. We perceive no basis for departing from that long-established rule.

Mr. Justice Story in his Commentaries, for example, explained that there was no immunity for republication of a speech first delivered in Congress:

> "Therefore, although a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere; *yet, if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefor, as in common cases of libel.* And the same principles seem applicable to the privilege of debate and speech in congress. No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so *in the actual discharge of his duties in congress, that furnishes no reason, why he should be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens.* It is neither within the scope of his duty, nor in furtherance of public rights, or public policy. Every citizen has as good a right to be protected by the laws from malignant scandal, and false charges, and defamatory imputations, as a member of congress has to utter them in his seat." [13] 2 J. Story, Com-

[13] Story acknowledged the arguments to the contrary: "It is proper, however, to apprise the learned reader, that it has been recently denied in congress by very distinguished lawyers, that the privilege of speech and debate in congress does not extend to publication of his speech. And they ground themselves upon an important distinction arising from the actual differences between English and American legislation. In the former, the publication of the debates is not strictly lawful, except by license of the house. In the latter, it is a common right, exercised and supported by the direct encouragement of the body. This reasoning deserves a very attentive examination." 2 J. Story, Commentaries on the Constitution § 863, pp. 329–330 (1833).

At oral argument, counsel for respondents referred to a note in the fifth edition of the Commentaries saying that the Speech or Debate Clause protected the circulation to constituents of copies of speeches made in

> mentaries on the Constitution § 863, p. 329 (1833) (emphasis added).

See also L. Cushing, Elements of the Law and Practice of Legislative Assemblies in the United States of America ¶ 604, p. 244 (1st ed. reprint 1971).

Story summarized the state of the common law at the time the Constitution was drafted, recalling that Parliament had by then succeeded in its struggle to secure freedom of debate. But the privilege did not extend to republication of libelous remarks even though first made in Parliament. Thus, in *King* v. *Lord Abingdon*, 1 Esp. 225, 170 Eng. Rep. 337 (N. P. 1794), Lord Chief Justice Kenyon rejected Lord Abingdon's argument that parliamentary privilege protected him from suit for republication of a speech first made in the House of Lords:

> "[A]s to the words in question, had they been spoken in the House of Lords, and confined to its walls, [the] Court would have had no jurisdiction to call his Lordship before them, to answer for them as an offence; but . . . in the present case, the offence was the publication under his authority and sanction, and at his expense: . . . a member of Parliament had certainly a right to publish his speech, but that speech should not be made the vehicle of slander against any individual; if it was, it was a libel . . . ." *Id.*, at 228, 170 Eng. Rep., at 338.

A similar result was reached in *King* v. *Creevey*, 1 M. & S. 273, 105 Eng. Rep. 102 (K. B. 1813).

Congress. Tr. of Oral Arg. 43. In attributing the note to Story, counsel made an understandable mistake. As explained in the preface to the fifth edition, that note was added by the editor, Melville Bigelow. The note does not appear in Story's first edition. Moreover, it is clear from the text of the note and the sources cited that Bigelow did not mean that there was an absolute privilege for defamatory remarks contained in a speech mailed to constituents as there would be if the mailing was protected by the Speech or Debate Clause. Instead, he suggested that there was a qualified privilege, akin to that for accurate newspaper reports of legislative proceedings.

In *Gravel* v. *United States*, 408 U. S., at 622–626, we recognized that the doctrine denying immunity for republication had been accepted in the United States:

> "[P]rivate publication by Senator Gravel . . . was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence." *Id.*, at 625.

We reaffirmed that principle in *Doe* v. *McMillan*, 412 U. S., at 314–315:

> "A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process 'by which Members participate in committee and House proceedings.'" (Footnote omitted; quoting from *Gravel* v. *United States*, *supra*, at 625.)[14]

We reach a similar conclusion here. A speech by Proxmire in the Senate would be wholly immune and would be available to other Members of Congress and the public in the Congressional Record. But neither the newsletters nor the press release was "essential to the deliberations of the Senate" and neither was part of the deliberative process.

Respondents, however, argue that newsletters and press releases are essential to the functioning of the Senate; without

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[14] It is worth noting that the Rules of the Senate forbid disparagement of other Members on the floor. Senate Rule XIX (Apr. 1979). See also T. Jefferson, A Manual of Parliamentary Practice 40–41 (1854), reprinted in The Complete Jefferson 714–715 (S. Padover ed. 1943).

them, they assert, a Senator cannot have a significant impact on the other Senators. We may assume that a Member's published statements exert some influence on other votes in the Congress and therefore have a relationship to the legislative and deliberative process. But in *Brewster*, 408 U. S., at 512, we rejected respondents' expansive reading of the Clause:

> "It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include . . . preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress."

There we went on to note that *United States* v. *Johnson*, 383 U. S. 169 (1966), had carefully distinguished between what is only "related to the due functioning of the legislative process," and what constitutes the legislative process entitled to immunity under the Clause:

> "In stating that those things [Johnson's attempts to influence the Department of Justice] 'in no wise related to the due functioning of the legislative process' were *not* covered by the privilege, the Court did not in any sense imply as a corollary that everything that 'related' to the office of a Member was shielded by the Clause. Quite the contrary, in *Johnson* we held, citing *Kilbourn* v. *Thompson*, *supra*, that only acts generally done in the course of the process of enacting legislation were protected.
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> . . . . .
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> "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process.
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> . . . . .
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> ". . . In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander [by speech or debate] and even destroy

> others with impunity, but that was the conscious choice of the Framers." 408 U. S., at 513–516. (Emphasis in original.)

We are unable to discern any "conscious choice" to grant immunity for defamatory statements scattered far and wide by mail, press, and the electronic media.

Respondents also argue that newsletters and press releases are privileged as part of the "informing function" of Congress. Advocates of a broad reading of the "informing function" sometimes tend to confuse two uses of the term "informing." In one sense, Congress informs itself collectively by way of hearings of its committees. It was in that sense that Woodrow Wilson used "informing" in a statement quoted by respondents. In reality, Wilson's statement related to congressional efforts to learn of the activities of the Executive Branch and administrative agencies; he did not include wide-ranging inquiries by individual Members on subjects of their choice. Moreover, Wilson's statement itself clearly implies a distinction between the *informing* function and the *legislative* function:

> "Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. . . . [T]he only really self-governing people is that people which discusses and interrogates its administration." W. Wilson, Congressional Government 303 (1885).

It is in this narrower Wilsonian sense that this Court has employed "informing" in previous cases holding that con-

gressional efforts to inform itself through committee hearings are part of the legislative function.

The other sense of the term, and the one relied upon by respondents, perceives it to be the duty of Members to tell the public about their activities. Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process.[15] As a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause.

Doe v. *McMillan,* 412 U. S. 306 (1973), is not to the contrary. It dealt only with reports from congressional committees, and held that Members of Congress could not be held liable for voting to publish a report. Voting and preparing committee reports are the individual and collective expressions of opinion within the legislative process. As such, they are protected by the Speech or Debate Clause. Newsletters and press releases, by contrast, are primarily means of informing those outside the legislative forum; they represent the views and will of a single Member. It does not disparage either their value or their importance to hold that they are not entitled to the protection of the Speech or Debate Clause.

V

Since *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964),[16] this Court has sought to define the accommodation

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[15] Provision for the use of the frank, 39 U. S. C. § 3210, does not alter our conclusion. Congress, by granting franking privileges, stationery allowances, and facilities to record speeches and statements for radio broadcast cannot expand the scope of the Speech or Debate Clause to render immune all that emanates via such helpful facilities.

[16] Neither the District Court nor the Court of Appeals considered whether the *New York Times* standard can apply to an individual defendant rather than to a media defendant. At oral argument, counsel for Hutchinson stated that he had not conceded that the *New York Times*

required to assure the vigorous debate on the public issues that the First Amendment was designed to protect while at the same time affording protection to the reputations of individuals. *E. g., Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974); *Rosenbloom* v. *Metromedia, Inc.,* 403 U. S. 29 (1971); *St. Amant* v. *Thompson,* 390 U. S. 727 (1968); *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967); *Rosenblatt* v. *Baer,* 383 U. S. 75 (1966). In *Gertz* v. *Robert Welch, Inc.,* the Court offered a general definition of "public figures":

> "For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment." 418 U. S., at 345.

It is not contended that Hutchinson attained such prominence that he is a public figure for all purposes. Instead, respondents have argued that the District Court and the Court of Appeals were correct in holding that Hutchinson is a public figure for the limited purpose of comment on his receipt of federal funds for research projects. That conclusion was based upon two factors: first, Hutchinson's successful application for federal funds and the reports in local newspapers of the federal grants; second, Hutchinson's access to the media, as demonstrated by the fact that some newspapers and wire services reported his response to the announcement of the Golden Fleece Award. Neither of those factors demon-

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standard applied. Tr. of Oral Arg. 18. This Court has never decided the question; our conclusion that Hutchinson is not a public figure makes it unnecessary to do so in this case.

strates that Hutchinson was a public figure prior to the controversy engendered by the Golden Fleece Award; his access, such as it was, came after the alleged libel.

On this record, Hutchinson's activities and public profile are much like those of countless members of his profession. His published writings reach a relatively small category of professionals concerned with research in human behavior. To the extent the subject of his published writings became a matter of controversy, it was a consequence of the Golden Fleece Award. Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure. See *Wolston* v. *Reader's Digest Assn., Inc., post,* at 167–168.

Hutchinson did not thrust himself or his views into public controversy to influence others. Respondents have not identified such a particular controversy; at most, they point to concern about general public expenditures. But that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure. If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected. The "use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area." *Time, Inc.* v. *Firestone, supra,* at 456.

Moreover, Hutchinson at no time assumed any role of public prominence in the broad question of concern about expenditures. Neither his applications for federal grants nor his publications in professional journals can be said to have invited that degree of public attention and comment on his receipt of federal grants essential to meet the public figure level. The petitioner in *Gertz* v. *Robert Welch, Inc.*, had published books and articles on legal issues; he had been

active in local community affairs. Nevertheless, the Court concluded that his activities did not make him a public figure.

Finally, we cannot agree that Hutchinson had such access to the media that he should be classified as a public figure. Hutchinson's access was limited to responding to the announcement of the Golden Fleece Award. He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure.

We therefore reverse the judgment of the Court of Appeals and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART joins in all but footnote 10 of the Court's opinion. He cannot agree that the question whether a communication by a Congressman or a member of his staff with a federal agency is entitled to Speech or Debate Clause immunity depends upon whether the communication is defamatory. Because telephone calls to federal agency officials are a routine and essential part of the congressional oversight function, he believes such activity is protected by the Speech or Debate Clause.

MR. JUSTICE BRENNAN, dissenting.

I disagree with the Court's conclusion that Senator Proxmire's newsletters and press releases fall outside the protection of the speech-or-debate immunity. In my view, public criticism by legislators of unnecessary governmental expenditures, whatever its form, is a legislative act shielded by the Speech or Debate Clause. I would affirm the judgment below for the reasons expressed in my dissent in *Gravel* v. *United States*, 408 U. S. 606, 648 (1972).

BAKER *v.* McCOLLAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–752. Argued April 23, 1979—Decided June 26, 1979

Respondent's brother somehow procured a duplicate of respondent's driver's license, except that it bore the brother's picture. The brother was arrested on narcotics charges, booked in respondent's name, and released on bond. An arrest warrant intended for the brother was subsequently issued in respondent's name. Pursuant to that warrant, respondent, over his protest, was taken into custody by the Potter County, Tex., Sheriff's Department and detained in jail for several days before the error was discovered and he was released. Claiming that his detention in jail had deprived him of liberty without due process of law, respondent brought an action in District Court against petitioner sheriff of Potter County and his surety under 42 U. S. C. § 1983, which imposes civil liability on any person who, under color of state law, subjects another to the deprivation of rights "secured by the Constitution and laws." The District Court directed a verdict in favor of petitioner and his surety. The Court of Appeals, characterizing respondent's cause of action as a "[§] 1983 false imprisonment action," reversed, holding that respondent was entitled to have his § 1983 claim presented to the jury even though the evidence supported no more than a finding of negligence on petitioner's part.

Held: Respondent failed to satisfy § 1983's threshold requirement that the plaintiff be deprived of a right "secured by the Constitution and laws," and hence had no claim cognizable under § 1983. Pp. 142–147.

(a) Absent an attack on the validity of the warrant under which he was arrested, respondent's complaint is simply that, despite his protests of mistaken identity, he was detained in jail for three days. Whatever claim this situation might give rise to under state tort law, it gives rise to no claim under the Fourteenth Amendment to the United States Constitution. While respondent was deprived of his liberty for three days, it was pursuant to a warrant conforming to the requirements of the Fourth Amendment. His detention, therefore, did not amount to a deprivation of liberty *without due process of law*. Pp. 142–145.

(b) Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment, is largely irrelevant to his claim of deprivation of liberty without due process of law.

Given the requirements that an arrest be made only on probable cause and that one detained be accorded a speedy trial, a sheriff executing a valid arrest warrant is not required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official maintaining custody of the person named in the warrant required by the Constitution to perform an error-free investigation of such a claim. Pp. 145–146.

(c) The tort of false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official. P. 146.

575 F. 2d 509, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 147. MARSHALL, J., filed a dissenting opinion, *post*, p. 149. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 149.

A. W. SoRelle III argued the cause for petitioner. With him on the briefs were *Kerry Knorpp* and *John L. Owen*.

Douglas R. Larson argued the cause and filed a brief for respondent.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Last Term, in *Procunier* v. *Navarette*, 434 U. S. 555 (1978), we granted certiorari to consider the question whether negligent conduct can form the basis of an award of damages under 42 U. S. C. § 1983. The constitutional violation alleged in *Procunier* was interference on the part of prison officials with a prisoner's outgoing mail. The complaint alleged that the prison officials had acted with every conceivable state of mind, from "knowingly" and in "bad faith" to "negligently and inadvertently." We granted certiorari, however, only on the question "[w]hether negligent failure to mail certain of

**Leon Friedman, Alan H. Levine,* and *Harold C. Hirshman* filed a brief for the American Civil Liberties Union et al. as *amici curiae*.

a prisoner's outgoing letters states a cause of action under § 1983." 434 U. S., at 559 n. 6.

Following oral argument and briefing on the merits, the Court held that since the constitutional right allegedly violated had not been authoritatively declared at the time the prison officials acted, the officials were entitled, as a matter of law, to prevail on their claim of qualified immunity. Quoting from *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975), we observed: "Because [the prison officials] could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, [they] did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as being in good faith.' " 434 U. S., at 565. It was thus unnecessary to reach the question on which certiorari had been granted.

In the instant case, the Court of Appeals for the Fifth Circuit saw the focal issue as whether petitioner Baker, the sheriff of Potter County, Tex., had negligently failed to establish certain identification procedures which would have revealed that respondent was not the man wanted in connection with the drug charges on which he was arrested. Accordingly, it withheld decision until our opinion in *Procunier* was handed down. Finding no guidance in *Procunier* on the question whether an allegation of "simple negligence" states a claim for relief under § 1983, the Court of Appeals proceeded to answer that question affirmatively, holding that respondent was entitled to have his § 1983 claim presented to the jury even though the evidence supported no more than a finding of negligence on the part of Sheriff Baker. We granted certiorari. 439 U. S. 1114 (1979).

Having been around this track once before in *Procunier, supra*, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform

answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action. In any event, before the relationship between the defendant's state of mind and his liability under § 1983 can be meaningfully explored, it is necessary to isolate the precise constitutional violation with which he is charged. For § 1983 imposes civil liability only upon one

> "who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws* . . . ."

The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the Constitution and laws." If there has been no such deprivation, the state of mind of the defendant is wholly immaterial.[1] We think that respondent has failed to satisfy this threshold requirement of § 1983 and thus defer once again consideration of the question whether simple negligence can give rise to § 1983 liability.

I

Leonard McCollan and respondent Linnie Carl McCollan are brothers. Leonard somehow procured a duplicate of Linnie's driver's license, identical to the original in every respect except that, as the Court of Appeals put it, "Leonard's picture graced it instead of Linnie's." *McCollan* v. *Tate*, 575 F. 2d 509, 511 (CA5 1978). In October 1972, Leonard, masquerading as Linnie, was arrested in Potter County on nar-

[1] Of course, the state of mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place, quite apart from the issue of whether § 1983 contains some additional qualification of that nature before a defendant may be held to respond in damages under its provisions.

cotics charges. He was booked as Linnie Carl McCollan, signed various documents as Linnie Carl McCollan, and was released on bail as Linnie Carl McCollan. Leonard's bondsman sought and received an order allowing him to surrender his principal and a warrant was issued for the arrest of "Linnie Carl McCollan."

On December 26, 1972, Linnie was stopped in Dallas for running a red light. A routine warrant check revealed that Linnie Carl McCollan was wanted in Potter County, and respondent was taken into custody over his protests of mistaken identification. The Dallas Police Department contacted the Potter County Sheriff's Department, compared the identifying information on respondent's driver's license with that contained in the Potter County arrest records, and understandably concluded that they had their man. On December 30, Potter County deputies took custody of respondent and placed him in the Potter County Jail in Amarillo. He remained there until January 2, 1973, when officials compared his appearance against a file photograph of the wanted man and, recognizing their error, released him.

Respondent brought this damages action "pursuant to the Fourteenth Amendment to the United States Constitution and . . . [§] 1983." App. 6. After each party had rested his case, the United States District Court for the Northern District of Texas directed a verdict in favor of Sheriff Baker and his surety, Transamerica Insurance Co., without articulating its reasons. The Court of Appeals for the Fifth Circuit reversed. Characterizing respondent's cause of action as a "[§] 1983 false imprisonment action," the Court of Appeals determined that respondent had made out a prima facie case by showing (1) intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of confinement or resulting harm. The question in the court's view thus became whether Sheriff Baker was entitled to the defense of qualified immunity, which in turn depended on the reason-

ableness of his failure to institute an identification procedure that would have disclosed the error. Noting that the error would have been discovered if Potter County officials had sent identifying material to Dallas or had immediately upon respondent's arrival in Amarillo compared him with the file photograph and fingerprints of the wanted man, the Court of Appeals determined that a jury could reasonably conclude that the sheriff had behaved unreasonably in failing to institute such measures. Accordingly, the case was remanded to the District Court for a new trial.

II

Respondent's claim is that his detention in the Potter County jail was wrongful. Under a tort-law analysis it may well have been. The question here, however, is whether his detention was unconstitutional. For, as the Court of Appeals recognized, a public official is liable under § 1983 only "if he *causes* the plaintiff to be subjected to deprivation of his constitutional rights." 575 F. 2d, at 512 (emphasis in original). Despite this recognition, the Court of Appeals analyzed respondent's so-called "[§] 1983 false imprisonment action" exclusively in terms of traditional tort-law concepts, relying heavily on the Restatement (Second) of Torts (1965). Indeed, nowhere in its opinion does the Court of Appeals specifically identify the constitutional right allegedly infringed in this case. Because respondent's claim and the Court of Appeals' decision focus exclusively on respondent's prolonged detention caused by petitioner's failure to institute adequate identification procedures, the constitutional provision allegedly violated by petitioner's action is presumably the Fourteenth Amendment's protection against deprivations of liberty without due process of law.

By virtue of its "incorporation" into the Fourteenth Amendment, the Fourth Amendment requires the States to provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty. *Ger-*

stein v. *Pugh*, 420 U. S. 103 (1975). The probable-cause determination "must be made by a judicial officer either before or promptly after arrest." *Id.*, at 125. Since an adversary hearing is not required, and since the probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial.[2]

In this case, respondent was arrested pursuant to a facially valid warrant, and the Court of Appeals made no suggestion that respondent's arrest was constitutionally deficient. Indeed, respondent makes clear that his § 1983 claim was based solely on Sheriff Baker's actions after respondent was incarcerated:

> "McCollan's § 1983 claim against the sheriff is not for the wrong name being placed in the warrant or the failure to discover and change same or even the initial arrest of the respondent, but rather for the intentional failure to investigate and determine that the wrong man was imprisoned." Brief for Respondent 12.

For purposes of analysis, then, this case can be parsed with relative ease. Absent an attack on the validity of the warrant under which he was arrested, respondent's complaint is

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[2] In rejecting the contention that a defendant is entitled to an adversary hearing on the question of probable cause to detain, the *Gerstein* Court stated:

"These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof." 420 U. S., at 120 (footnote omitted).

simply that despite his protests of mistaken identity, he was detained in the Potter County jail from December 30, when Potter County deputies retrieved him from Dallas, until January 2, when the validity of his protests was ascertained. Whatever claims this situation might give rise to under state tort law, we think it gives rise to no claim under the United States Constitution. Respondent was indeed deprived of his liberty for a period of days, but it was pursuant to a warrant conforming, for purposes of our decision, to the requirements of the Fourth Amendment. Obviously, one in respondent's position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment. For the Constitution likewise guarantees an accused the right to a speedy trial, and invocation of the speedy trial right need not await indictment or other formal charge; arrest pursuant to probable cause is itself sufficient. *United States* v. *Marion*, 404 U. S. 307 (1971).[3]

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[3] We of course agree with the dissent's quotation of the statement from *Schilb* v. *Kuebel*, 404 U. S. 357, 365 (1971), that "the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." *Post*, at 149 n. 1. But the inference that the dissent appears to draw from this statement—that States are required by the United States Constitution to release an accused criminal defendant on bail—would, if correct, merely supply one more possibility of release from incarceration by resort to procedures specifically set out in the Bill of Rights, over and above those guarantees discussed in the text. It is for violations of such constitutional and statutory rights that 42 U. S. C. § 1983 authorizes redress; that section is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes. Cases such as *Neil* v. *Biggers*, 409 U. S. 188, 198 (1972), relied upon by the dissent, *post*, at 152–153, and n. 7, in no way contradict this view. The discussion of misidentification in *Neil* was in the context of the use of eyewitness identification testimony at the trial which the United States Constitution guarantees to any accused before he may be punished. See *Bell* v. *Wolfish*, 441 U. S. 520 (1979).

We may even assume, *arguendo,* that, depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of "liberty . . . without due process of law." But we are quite certain that a detention of three days over a New Year's weekend does not and could not amount to such a deprivation.

Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law.[4] The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of Rights "without limits." *Patterson* v. *New York,* 432 U. S. 197, 208 (1977). "Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Ibid.*

The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished "without due process of law." A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers—all of whom may be potential defendants in a § 1983 action—is entirely consistent with "due process of law." Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Con-

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[4] We, of course, do not deal here with a criminal defendant's claim to a new trial *after* conviction where that claim is based upon newly discovered evidence. Most States provide a procedure similar to that contained in Fed. Rule Crim. Proc. 33 to process such claims.

stitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.[5]

III

The Court of Appeals closed its opinion with the following summary of its holding:

> "We are saying that the sheriff or arresting officer has a duty to exercise due diligence in making sure that the person arrested and detained is actually the person sought under the warrant and not merely someone of the same or a similar name. *See* Restatement (2d) Torts § 125, comment (d) (1965)." 575 F. 2d, at 513.

Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.

Having been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under

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[5] In view of the substantive analysis employed by the dissent, it would seem virtually impossible to reach a conclusion other than that any case of misidentification in connection with an arrest made pursuant to an admittedly valid warrant or concededly on probable cause would constitute a deprivation of liberty without due process of law.

§ 1983. The judgment of the Court of Appeals for the Fifth Circuit is therefore

Reversed.

MR. JUSTICE BLACKMUN, concurring.

The Court long has struggled to define the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. The Court today looks to the provisions of the Bill of Rights that have been "incorporated" into the Due Process Clause, including the right to be free from unreasonable seizures, the right to bail, and the right to a speedy trial, and, finding that none of those specifically incorporated rights apply here, concludes that petitioner did not deny respondent due process in holding him in jail during a holiday weekend. *Ante*, at 144–145.

The Court's cases upon occasion have defined "liberty" without specific guidance from the Bill of Rights. For example, it has found police conduct that "shocks the conscience" to be a denial of due process. *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Mr. Justice Harlan once wrote: "This 'liberty' is not a series of isolated points pricked out in terms of [the Bill of Rights]. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (dissenting opinion). See also *Roe* v. *Wade*, 410 U. S. 113, 152–156 (1973).

The Court today does not consider whether petitioner's conduct "shocks the conscience" or is so otherwise offensive to the "concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), as to warrant a finding that petitioner denied respondent due process of law. Nothing in petitioner's conduct suggests outrageousness. He had been sheriff for only 40 days when this incident occurred, and, viewing the facts in the light most favorable to respondent, petitioner's error lay solely in failing to supervise the conduct of the

deputies who transferred respondent to the Potter County jail and kept him there over the weekend. The Court of Appeals' finding that petitioner "intended to confine" respondent rested solely on petitioner's knowledge of the office procedures, not on any knowledge of respondent or even on an awareness at the time this incident occurred that the procedures might be ineffective. In contrast to the deputies who, as MR. JUSTICE STEVENS and MR. JUSTICE MARSHALL point out, *post,* at 151–152 and 149, turned a deaf ear to respondent's protests, petitioner checked the files and released respondent as soon as petitioner became aware of respondent's claim. The deputies are not parties to this lawsuit. While I concluded in *Rizzo* v. *Goode,* 423 U. S. 362, 384–387 (1976) (dissenting opinion), that the reckless failure of a police official to stop a pattern of clearly unconstitutional conduct by his subordinates could be enjoined under § 1983, here there is no indication that petitioner was aware, or should have been aware, either of the likelihood of misidentification or of his subordinates' action in this case.

I do not understand the Court's opinion to speak to the possibility that *Rochin* might be applied to this type of case or otherwise to foreclose the possibility that a prisoner in respondent's predicament might prove a due process violation by a sheriff who deliberately and repeatedly refused to check the identity of a complaining prisoner against readily available mug shots and fingerprints. Such conduct would be far more "shocking" than anything this petitioner has done. The Court notes that intent is relevant to the existence of a constitutional violation, *ante,* at 140 n. 1, it reserves judgment as to whether a more lengthy incarceration might deny due process, *ante,* at 144, and it concludes only that "every" claim of innocence need not be investigated independently, *ante,* at 145–146. I therefore do not agree with MR. JUSTICE STEVENS' suggestion, *post,* at 154 n. 14, that a prisoner in respondent's predicament would be foreclosed from seeking a writ of habeas

corpus. Because this is my understanding, and because I agree that the rights surveyed by the Court do not here provide a basis for the damages award respondent seeks, I concur in the judgment of the Court and join its opinion.

MR. JUSTICE MARSHALL, dissenting.

While I join the dissenting opinion of my Brother STEVENS, I would add one or two additional words. As I view this case, neither "negligence" nor "mere negligence" is involved. Respondent was arrested and not released. This constituted intentional action and not, under these circumstances, negligence. For despite respondent's repeated protests of misidentification, as well as information possessed by the Potter County sheriff suggesting that the name in the arrest warrant was incorrect, see *post*, at 151 (STEVENS, J., dissenting), petitioner and his deputies made absolutely no effort for eight days to determine whether they were holding an innocent man in violation of his constitutionally protected rights.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

When a State deprives a person of his liberty after his arrest, the Constitution requires that it be prepared to justify not only the initial arrest, but the continued detention as well.[1] Respondent's arrest on December 26, 1972, was authorized by a valid warrant, and no claim is raised that it violated his Fourth Amendment rights. The question is whether the deprivation of his liberty during the next eight days—despite his protests of mistaken identity—was "without due process of

[1] See *Gerstein* v. *Pugh*, 420 U. S. 103, 113–114. See also *Schilb* v. *Kuebel*, 404 U. S. 357, 365 ("[T]he Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment"); *Stack* v. *Boyle*, 342 U. S. 1, 4 ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning").

law" within the meaning of the Fourteenth Amendment. The record in this case makes clear that the procedures employed by the sheriff of Potter County, Tex., at the time were not reasonably calculated to establish that a person being detained for the alleged commission of a crime was in fact the person believed to be guilty of the offense. In my judgment, such procedures are required by the Due Process Clause, and the deprivation of respondent's liberty occasioned by their absence is a violation of his Fourteenth Amendment rights.

I

Respondent's brother Leonard was arrested by a member of the City of Amarillo Police Force on September 11, 1972; city police officers photographed and fingerprinted him. On October 6, 1972, he was transferred to the custody of the sheriff of Potter County. At that time, contrary to normal practice, the Potter County sheriff's office took possession of the driver's license the brother was carrying. They did so because it was apparent that the license had been altered. The sheriff testified that an alteration of that kind established a likelihood that the arrestee was using an alias.[2]

A professional surety posted bond and respondent's brother was released. On November 3, 1972, for reasons that do not appear in the record, the bondsman sought and received an order allowing him to surrender respondent's brother. A warrant for his re-arrest was therefore issued. Since the brother had been masquerading as respondent, the warrant was issued in respondent's name.[3] Although respondent has not questioned the validity of the warrant—presumably because it issued before petitioner became sheriff—he has emphasized the fact that the altered driver's license in the file gave the sheriff's deputies reason to believe that the wanted person was using an alias.

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[2] App. 36–40.

[3] *Id.*, at 40–42, 118.

On December 26, 1972, respondent was stopped for a traffic violation in Dallas. The Dallas patrolman made a routine radio check and learned that the Potter County warrant was outstanding. Over respondent's repeated protests that he was not the right man, the officer placed him under arrest and took him to a Dallas police station. The desk sergeant telephoned the Potter County sheriff's office and apparently learned that respondent's name, sex, race, and date of birth corresponded with the information provided by the sheriff. No mention appears to have been made of the fact that the sheriff's files contained an altered driver's license issued in respondent's name, even though respondent was obviously carrying a license when he was ticketed for the traffic offense.[4] In short, the fact that the sheriff's office had reason to believe that the name in the warrant was an alias did not motivate any special effort to verify the arrestee's identification.

The sheriff's deputies allowed respondent to remain in the Dallas lockup for four days before they picked him up. At the time they did so, they failed to follow an identification procedure used by comparable sheriff's offices. They did not take the pictures and fingerprints in the file with them to Dallas to be sure that they had the man they wanted. Nor, when they returned to the Potter County jail, did they refer to the pictures or the prints notwithstanding respondent's continued protests of misidentification and the ready availability of the information.[5]

The ensuing four days included a holiday weekend when the sheriff was apparently away from his office. It was nevertheless a busy period for his staff since about 150 prisoners were being detained in a jail designed to house only 88.[6] In

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[4] See *id.*, at 42–43.

[5] "The sheriff himself testified that it was a standard practice in most sheriff's departments the size of his to send such identifying material." *McCollan* v. *Tate*, 575 F. 2d 509, 513. See App. 44–45, 52–53.

[6] *Id.*, at 83.

all, there was no procedure in effect that led any of the sheriff's deputies to pull out the file and compare the pictures and fingerprints with respondent. Of course, as soon as the sheriff did so on January 2, he recognized the mistake that had been made and immediately released respondent.

It is evident that respondent's 8-day imprisonment would have been at least cut in half if any one of several different procedures had been followed by the sheriff's office. If his brother's file had been marked to indicate that he was probably using an alias, a more thorough and prompt identification check would surely have been made; if he had been transferred from Dallas to Potter County promptly, he apparently would have arrived before the sheriff left for the holiday weekend. If a prompt pickup was not feasible, a prompt mailing of the fingerprints and photographs would have revealed the error; if the deputies who picked him up had taken the fingerprints and photographs with them, he would have been released in Dallas; if the file had been checked when he arrived at the Potter County jail, or if the sheriff had delegated authority to review complaints of misidentification during his absence, respondent would not have spent four days in the Potter County jail. In short, almost any regular procedures for verifying an arrestee's identification would have resulted in the prompt release of respondent.

II

The Due Process Clause clearly protects an individual from conviction based on identification procedures which are improperly suggestive. In a criminal trial, that Clause requires the exclusion of evidence obtained through procedures presenting "a very substantial likelihood of . . . misidentification." *Simmons* v. *United States,* 390 U. S. 377, 384. Fair procedures must be used, to prevent an "irreparable misidentification" and the resulting deprivation of liberty attaching to

conviction. *Ibid.*[7] In my judgment, the Due Process Clause equally requires that fair procedures be employed to ensure that the wrong individual is not subject to the deprivations of liberty attaching to pretrial detention.

Pretrial detention unquestionably involves a serious deprivation of individual liberty. "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein* v. *Pugh*, 420 U. S. 103, 114. The burdens of pretrial detention are substantial ones to impose on a presumptively innocent man, even when there is probable cause to believe he has committed a crime.[8] To impose such burdens on the wrong man—on a man who has been mistakenly identified as a suspect because of inadequate identification procedures—seems to me clearly unconstitutional. It is wholly at odds with the constitutional restraints imposed on police officers in the performance of investigative stops,[9] the establishment of probable cause to detain as well as to arrest,[10] and the questioning of suspects taken into custody.[11] In each of these activities, police officers must conform to procedures mandated by the Constitution which serve to minimize

[7] See *Foster* v. *California*, 394 U. S. 440; *Neil* v. *Biggers*, 409 U. S. 188, 198 ("It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*"). See also *United States* v. *Wade*, 388 U. S. 218, 228 ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification").

[8] See *Bell* v. *Wolfish*, 441 U. S. 520, 569, and n. 7 (MARSHALL, J., dissenting); *id.*, at 593 (STEVENS, J., dissenting).

[9] See *Terry* v. *Ohio*, 392 U. S. 1; *Delaware* v. *Prouse*, 440 U. S. 648.

[10] See, *e. g.*, *Dunaway* v. *New York*, 442 U. S. 200; *Spinelli* v. *United States*, 393 U. S. 410.

[11] See, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387; *Miranda* v. *Arizona*, 384 U. S. 436; *Turner* v. *Pennsylvania*, 338 U. S. 62 (coerced confession excluded on due process grounds even if "trustworthiness" test met). See also *Rochin* v. *California*, 342 U. S. 165.

the risk of wrongful and unjustified deprivations of personal liberty. It surely makes little sense to enforce limits on the police officer seeking out and detaining those whom he believes to have committed crimes without at the same time requiring adherence to procedures designed to ensure that the subject of the police action and detention is in fact the individual the officer believes he is.

In rejecting respondent's claim that his mistaken detention violated his constitutional rights, the Court today relies on two alternative rationales. First, it seems to hold that the constitutional right to a speedy trial provides adequate assurance against unconstitutional detentions, so long as the initial arrest is valid. I cannot agree. A speedy trial within the meaning of the Constitution may take place weeks or months—if not years—after the initial arrest.[12] And many arrested persons—as many as 49% of those arrested in the District of Columbia—are never tried at all, with charges being dropped at some point prior to trial.[13]

Alternatively, the majority relies on the fact that the last three days of respondent's detention occurred over a holiday weekend to establish that the deprivation of his liberty was so minimal as not to require procedural protections. Whatever relevance the holiday might have to the sheriff's good-faith defense [14]—an issue not presented here—it is clear to me

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[12] See, *e. g.*, *Barker* v. *Wingo*, 407 U. S. 514 (delay of over four years held constitutional).

[13] See K. Brosi, A Cross-City Comparison of Felony Case Processing 7 (1979). Nationally, as many as 40% of all adult arrestees are released without the filing of charges. Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 7 (1974).

[14] While it might be argued that the holiday weekend would provide support for the sheriff's claim that he should be immune from damages on the grounds of a good-faith defense, it would surely seem irrelevant to any claim that respondent might have raised in a habeas corpus proceeding that he was being held in violation of his constitutional rights. Yet under the majority's holding, respondent would not be entitled to such relief, since his detention is not a violation of his constitutional rights.

that the coincidence of a holiday weekend hardly reduces the deprivation of liberty from respondent's point of view; indeed, one might regard the deprivation of liberty as particularly serious over a holiday weekend, and require a higher standard of care at such a time. No claim is made that respondent's deprivation was due to the failure to follow otherwise applicable procedures during a holiday weekend; and no such claim could be made, since the respondent was detained for five days before the holiday weekend, and since he was brought to Potter County before the weekend without confirming his identity according to procedures which are customary in comparable police departments.[15]

Certainly, occasional mistakes may be made by conscientious police officers operating under the strictest procedures. But this is hardly such a case. Here, there were no identification procedures. And the problems of mistaken identification are not, in my judgment, so insubstantial that the absence of such procedures, and the deprivation of individual liberty which results from their absence, should be lightly dismissed as of no constitutional significance. The practice of making a radio check with a centralized data bank is now a routine policy, followed not only in every traffic stop in Potter County,[16] but also in literally hundreds of thousands of cases per day nationwide.[17] The risk of misidentification based on coincidental similarity of names, birthdays, and descriptions

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[15] See 575 F. 2d, at 512 ("[T]he deputies' actions were authorized by Sheriff Baker and the same actions were in keeping with the policies of the Potter County Sheriff's Department at that time").

[16] See App. 26 (testimony of Sheriff Baker).

[17] As of May 1979, there were 7,285,951 records included in the data base of the National Crime Information Center (NCIC), the national computerized data bank operated by the Federal Bureau of Investigation and designed to assist federal, state, and local law enforcement agencies. In April 1979, an average of 279,966 requests for information from the system were made daily by law enforcement officials.

is unquestionably substantial;[18] it is reflected not only in cases processed by this Court,[19] but also in the emphasis placed on securing fingerprint identification by those responsible for the national computer system.[20] The societal interests in apprehending the guilty as well as the interests in avoiding the incarceration of the innocent equally demand that the identification of arrested persons conform to standards designed to minimize the risk of error. I am not prepared or qualified to define the standards that should govern this aspect of the law enforcement profession's work, but I have no hesitation in concluding that an 8-day imprisonment resulting from a total absence of *any* regular identification procedures in Potter County was a deprivation of liberty without the due process of law that the Constitution commands.

I respectfully dissent.

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[18] According to a study conducted by the International Association of Chiefs of Police, over 5,000 civil actions were filed against police officers asserting claims of false arrest or imprisonment between 1967 and 1971. This figure represented over 40% of the total number of suits filed during those years alleging any form of police misconduct. See Survey of Police Misconduct Litigation 1967–1971, p. 6 (Americans for Effective Law Enforcement 1974).

[19] See, *e. g.*, *Ulster County Court* v. *Allen*, 442 U. S. 140, in which the police held one of the respondents on the basis of mistaken information received in response to a radio check with headquarters. See also *United States* v. *Mackey*, 387 F. Supp. 1121 (Nev. 1975) (individual arrested based on inaccurate computer information). See generally Note, Garbage In, Gospel Out: Establishing Probable Cause Through Computerized Criminal Information Transmittals, 28 Hastings L. J. 509 (1976); DeWeese, Reforming our "Record Prisons": A Proposal for the Federal Regulation of Crime Data Banks, 6 Rutgers-Camden L. J. 26, 33 (1974) (citing report of 35% inaccuracy in criminal histories maintained by FBI).

[20] In the NCIC system, "[e]ach computerized offender criminal history cycle must have a criminal fingerprint card as its basic source document. This is necessary in order to preserve the personal identification integrity of the system." NCIC, Computerized Criminal History Program; Background, Concept and Policy 4 (FBI 1978). "[T]he long-standing law enforcement fingerprint identification process is an essential element in the criminal justice system." *Id.*, at 13.

WOLSTON *v.* READER'S DIGEST ASSOCIATION, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78–5414. Argued April 17, 1979—Decided June 26, 1979

As a result of a grand jury investigation, during 1957 and 1958, of Soviet intelligence agents in the United States, petitioner's aunt and uncle were arrested on, and later pleaded guilty to, espionage charges. In the ensuing months, petitioner, pursuant to grand jury subpoenas, traveled from his home in the District of Columbia to New York City, where the grand jury was sitting, but on one occasion he failed to respond to a subpoena, having previously attempted unsuccessfully to persuade law enforcement authorities not to require him to travel because of his mental condition. A Federal District Judge then issued an order to show cause why petitioner should not be adjudged in criminal contempt of court. Petitioner appeared in court on the return date of this order and offered to testify before the grand jury but the offer was refused, and thereafter he pleaded guilty to the contempt charge when his pregnant wife became hysterical upon being called to testify as to his mental condition. Petitioner received a suspended sentence. These events were reported in a number of stories in the Washington and New York newspapers, but the publicity subsided following petitioner's sentencing and he succeeded for the most part in returning to the private life he had led prior to such events. In 1974, respondent Reader's Digest Association published a book written by respondent Barron, which describes the Soviet Union's espionage organization and chronicles its activities since World War II. The book was later published by the other respondent publishers. In one passage in the book, petitioner is named as "[a]mong Soviet agents identified in the United States" and "convicted of . . . contempt charges following espionage indictments," and the index lists petitioner as a "Soviet agent in U. S." Petitioner sued respondents, claiming that the above passages in the book were false and defamatory. The District Court granted respondents' motion for summary judgment, holding that petitioner was a "public figure" because, by failing to appear before the grand jury and subjecting himself to a citation for contempt, he "became involved in a controversy of a decidedly public nature in a way that invited attention and comment, and

thereby created in the public an interest in knowing about his connection with espionage"; that the First Amendment therefore precluded recovery unless petitioner proved that respondents had published a defamatory falsehood with "actual malice"; and that the evidence raised no genuine issue with respect to the existence of "actual malice." The Court of Appeals affirmed.

Held: Petitioner was not a public figure within the meaning of this Court's defamation cases and therefore was not required by the First Amendment to meet the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, in order to recover from respondents. Pp. 163–169.

(a) Contrary to respondents' argument and the lower courts' holdings, petitioner does not fall within the category of those public figures who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 345. Neither the mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that this might be attended by publicity, the citation for contempt, nor the simple fact that his failure to appear and the contempt citation attracted media attention, rendered him such a public figure. His failure to appear was in no way calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue, but rather appears simply to have been the result of his poor health. And there is no evidence that his failure to appear was intended to have, or did in fact have, any effect on any issue of public concern. Pp. 165–168.

(b) A person who engages in criminal conduct does not automatically become a public figure for purposes of comment on a limited range of issues relating to his conviction. *Time, Inc.* v. *Firestone*, 424 U. S. 448. To hold otherwise would create an "open season" for all who sought to defame persons convicted of a crime. Pp. 168–169.

188 U. S. App. D. C. 185, 578 F. 2d 427, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, in which MARSHALL, J., joined, *post*, p. 169. BRENNAN, J., filed a dissenting opinion, *post*, p. 172.

Sidney Dickstein argued the cause for petitioner. With him on the brief were *George Kaufmann* and *Leslie J. Ruben*.

John J. Buckley, Jr., argued the cause for respondents.

With him on the brief were *Edward Bennett Williams* and *David Otis Fuller, Jr.*†

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1974, respondent Reader's Digest Association, Inc., published a book entitled KGB, the Secret Work of Soviet Agents (KGB), written by respondent John Barron.[1] The book describes the Soviet Union's espionage organization and chronicles its activities since World War II. In a passage referring to disclosures by "royal commissions in Canada and Australia, and official investigations in Great Britain and the United States," the book contains the following statements relating to petitioner Ilya Wolston:

> "Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston,* Alfred and Martha Stern.*
>
> "*No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution. . . ." App. 28 (emphasis supplied).

In addition, the index to KGB lists petitioner as follows: "Wolston, Ilya, Soviet agent in U. S." *Id.*, at 29.

Petitioner sued the author and publishers of KGB in the United States District Court for the District of Columbia,

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†*Richard M. Schmidt, Jr.*, filed a brief for the American Society of Newspaper Editors et al. as *amici curiae* urging affirmance.

[1] Respondents Bantam Books, Inc., MacMillan Book Clubs, Inc., and Book-of-the-Month Club, Inc., are subsequent publishers of KGB under contractual arrangements with Reader's Digest.

claiming that the passages in KGB stating that he had been indicted for espionage and had been a Soviet agent were false and defamatory. The District Court granted respondents' motion for summary judgment. 429 F. Supp. 167 (1977). The court held that petitioner was a "public figure" and that the First Amendment therefore precluded recovery unless petitioner proved that respondents had published a defamatory falsehood with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964). 429 F. Supp., at 172, 176. While the District Court agreed that the above-quoted portions of KGB appeared to state falsely that petitioner had been indicted for espionage, it ruled, on the basis of affidavits and deposition testimony, that the evidence raised no genuine issue with respect to the existence of "actual malice" on the part of respondents. *Id.*, at 180–181. The Court of Appeals for the District of Columbia Circuit affirmed. 188 U. S. App. D. C. 185, 578 F. 2d 427 (1978).[2]

[2] Both the District Court and the Court of Appeals rested their decisions on the First Amendment to the United States Constitution. The District Court commented in a footnote that it "might also have decided to apply the actual-malice standard in this case on the ground that the law in the District of Columbia requires it." 429 F. Supp., at 178–179, n. 37. The court referred to an unpublished decision of the Superior Court of the District of Columbia as support for that proposition. *Hatter* v. *Evening Star Newspaper Co.*, Civ. No. 8298–75 (Mar. 15, 1975). But the Court of Appeals in a footnote to its opinion cast substantial doubt on the correctness of the District Court's comment. See 188 U. S. App. D. C., at 193 n. 3, 578 F. 2d, at 435 n. 3. It described *Hatter* as "a brief unpublished order which recited several other grounds for granting summary judgment" and which cited no District of Columbia authority, and it noted that subsequent to the District Court's decision, another judge of the District of Columbia Superior Court had "filed an elaborate opinion which concluded to the contrary that in the District a newspaper may be liable for actual damages suffered by a private person if it negligently publishes defamation, without actual malice." 188 U. S. App. D. C., at 193 n. 3, 578 F. 2d, at 435 n. 3, citing *Phillips* v. *Evening Star Newspaper Co.*,

We granted certiorari, 439 U. S. 1066 (1979), and we now reverse. We hold that the District Court and the Court of Appeals were wrong in concluding that petitioner was a public figure within the meaning of this Court's defamation cases. Petitioner therefore was not required by the First Amendment to meet the "actual malice" standard of *New York Times Co.* v. *Sullivan, supra,* in order to recover from respondents.[2]

During 1957 and 1958, a special federal grand jury sitting in New York City conducted a major investigation into the activities of Soviet intelligence agents in the United States. As a result of this investigation, petitioner's aunt and uncle, Myra and Jack Soble, were arrested in January 1957 on charges of spying. The Sobles later pleaded guilty to espionage charges, and in the ensuing months, the grand jury's investigation focused on other participants in a suspected Soviet espionage ring, resulting in further arrests, convictions, and

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Civ. No. 9999–75 (June 30, 1977). We assume that the Court of Appeals is as familiar as we are with the general principle that dispositive issues of statutory and local law are to be treated before reaching constitutional issues. *E. g., Dillard* v. *Virginia Industrial Comm'n,* 416 U. S. 783, 785 (1974); *Alma Motor Co.* v. *Timken-Detroit Axle Co.,* 329 U. S. 129, 136 (1946); *Siler* v. *Louisville & Nashville R. Co.,* 213 U. S. 175, 193 (1909). We interpret the footnote to the Court of Appeals' opinion in this case, where jurisdiction is based upon diversity of citizenship, to indicate its view that *Phillips* represents a more accurate expression of District of Columbia law than the dicta from *Hatter* and that, therefore, the appeal could not be decided without reaching the constitutional question. See *Commissioner* v. *Estate of Bosch,* 387 U. S. 456, 465 (1967); *King* v. *Order of Travelers,* 333 U. S. 153, 162 (1948); *West* v. *American Tel. & Tel. Co.,* 311 U. S. 223, 236–237 (1940); *Washington Times Co.* v. *Bonner,* 66 App. D. C. 280, 86 F. 2d 836 (1936); *Johnson* v. *Johnson Pub. Co.,* 271 A. 2d 696 (D. C. App. 1970); *Chaloner* v. *Washington Post Co.,* 36 App. D. C. 231 (1911).

[3] Petitioner also challenges the propriety of summary judgment on the issue of "actual malice." Brief for Petitioner 21–31. In view of our disposition of the public-figure issue, we need not and do not reach this question. See generally *Hutchinson* v. *Proxmire, ante,* at 120 n. 9.

guilty pleas. On the same day the Sobles were arrested, petitioner was interviewed by agents of the Federal Bureau of Investigation at his home in the District of Columbia.[4] Petitioner was interviewed several more times during the following months in both Washington and in New York City and traveled to New York on various occasions pursuant to grand jury subpoenas.

On July 1, 1958, however, petitioner failed to respond to a grand jury subpoena directing him to appear on that date. Petitioner previously had attempted to persuade law enforcement authorities not to require him to travel to New York for interrogation because of his state of mental depression. App. 91 (affidavit of petitioner, June 15, 1976).[5] On July 14, a Federal District Judge issued an order to show cause why petitioner should not be held in criminal contempt of court. These events immediately attracted the interest of the news media, and on July 15 and 16, at least seven news stories focusing on petitoner's failure to respond to the grand jury subpoena appeared in New York and Washington newspapers.

Petitioner appeared in court on the return date of the show-cause order and offered to testify before the grand jury, but

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[4] "Wolston was born in Russia in 1918. He subsequently lived in Lithuania, Germany, France, and England before coming to the United States in 1939. The army drafted him in 1942, and during his tour of duty he became a naturalized citizen; he was trained as an interpreter and served primarily in Alaska. After receiving an honorable discharge in 1946 he worked as an interpreter for the United States Military Government and the State Department in Allied-occupied Berlin. He returned to the United States in 1951 and worked as a clerk until 1953, when he enrolled in an undergraduate program at New York University. In 1955 he and his wife moved to Washington, D. C., where he worked several months for the Army Map Service and then as a free-lance translator until January 1957. Deposition of Ilya Wolston at 5–42." 429 F. Supp., at 169 n. 1.

[5] Since this case was decided on respondents' motion for summary judgment, we must construe the record most favorably to petitioner. *E. g., Bishop* v. *Wood,* 426 U. S. 341, 347 n. 11 (1976); *United States* v. *Diebold, Inc.,* 369 U. S. 654, 655 (1962).

the offer was refused. A hearing then commenced on the contempt charges. Petitioner's wife, who then was pregnant, was called to testify as to petitioner's mental condition at the time of the return date of the subpoena, but after she became hysterical on the witness stand, petitioner agreed to plead guilty to the contempt charge. See App. 92 (affidavit of petitioner, June 15, 1976). He received a 1-year suspended sentence and was placed on probation for three years, conditioned on his cooperation with the grand jury in any further inquiries regarding Soviet espionage. *Ibid.* Newspapers also reported the details of the contempt proceedings and petitioner's guilty plea and sentencing. In all, during the 6-week period between petitioner's failure to appear before the grand jury and his sentencing, 15 stories in newspapers in Washington and New York mentioned or discussed these events. This flurry of publicity subsided following petitioner's sentencing, however, and, thereafter, he succeeded for the most part in returning to the private life he had led prior to issuance of the grand jury subpoena. 429 F. Supp., at 174.[6] At no time was petitioner indicted for espionage.

In *New York Times Co.* v. *Sullivan*, 376 U. S., at 279–280, the Court held that the First and Fourteenth Amendments prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct absent proof that the statement was made with "actual malice," as that term is defined in that opinion. See also *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Three years later, the Court

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[6] A short time after these events, petitioner was mentioned in two publications. In the book My Ten Years as a Counterspy, written by Boris Morros and published in 1959, Morros, a former confederate of Jack Soble who later became a double agent, states that Soble identified petitioner as a Soviet agent. App. 30–34. And in 1960, a report prepared by the Federal Bureau of Investigation, entitled Exposé of Soviet Espionage May 1960, listed petitioner's name among people "the FBI investigation resulted in identifying as Soviet intelligence agents." S. Doc. No. 114, 86th Cong., 2d Sess., 24, 26–27 (1960).

extended the *New York Times* standard to "public figures." *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 162 (1967) (Warren, C. J., concurring in result). But in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 344–347 (1974), we declined to expand the protection afforded by that standard to defamation actions brought by private individuals. We explained in *Gertz* that the rationale for extending the *New York Times* rule to public figures was twofold. First, we recognized that public figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective "self-help." They usually enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements. 418 U. S., at 344; see *Curtis Publishing Co.* v. *Butts*, 388 U. S., at 155 (plurality opinion); *id.*, at 164 (Warren, C. J., concurring in result). Second, and more importantly, was a normative consideration that public figures are less deserving of protection than private persons because public figures, like public officials, have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U. S., at 345; see *Curtis Publishing Co.* v. *Butts*, *supra*, at 164 (Warren, C. J., concurring in result). We identified two ways in which a person may become a public figure for purposes of the First Amendment:

> "For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U. S., at 345.

See *id.*, at 351; *Time, Inc.* v. *Firestone*, 424 U. S. 448, 453 (1976).

Neither respondents nor the lower courts relied on any claim that petitioner occupied a position of such "persuasive power and influence" that he could be deemed one of that small group of individuals who are public figures for all purposes. Petitioner led a thoroughly private existence prior to the grand jury inquiry and returned to a position of relative obscurity after his sentencing. He achieved no general fame or notoriety and assumed no role of special prominence in the affairs of society as a result of his contempt citation or because of his involvement in the investigation of Soviet espionage in 1958. See *Time, Inc.* v. *Firestone, supra,* at 453; *Gertz* v. *Robert Welch, Inc., supra,* at 352.

Instead, respondents argue, and the lower courts held, that petitioner falls within the second category of public figures—those who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"—and that, therefore, petitioner is a public figure for the limited purpose of comment on his connection with, or involvement in, Soviet espionage in the 1940's and 1950's. 188 U. S. App. D. C., at 189, 578 F. 2d, at 431; 429 F. Supp., at 174–178. Both lower courts found petitioner's failure to appear before the grand jury and citation for contempt determinative of the public-figure issue. The District Court concluded that by failing to appear before the grand jury and subjecting himself to a citation for contempt, petitioner "became involved in a controversy of a decidedly public nature in a way that invited attention and comment, and thereby created in the public an interest in knowing about his connection with espionage . . . ." *Id.*, at 177 n. 33. Similarly, the Court of Appeals stated that by refusing to comply with the subpoena, petitioner "stepped center front into the spotlight focused on the investigation of Soviet espionage. In short, by his voluntary action he invited attention and comment in connection with the public questions involved in the investigation of espionage." 188 U. S. App. D. C., at 189, 578 F. 2d, at 431.

We do not agree with respondents and the lower courts that petitioner can be classed as such a limited-purpose public figure.[7] First, the undisputed facts do not justify the conclusion of the District Court and Court of Appeals that petitioner "voluntarily thrust" or "injected" himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States.[8] See *Time, Inc.* v. *Firestone, supra,* at 453–454; *Gertz* v. *Robert Welch, Inc., supra,* at 352; *Curtis Publishing Co.* v. *Butts, supra,* at 155 (plurality opinion). It would be more accurate to say that petitioner was dragged unwillingly into the controversy. The Government pursued him in its investigation. Petitioner did fail to respond to a grand jury subpoena, and this failure, as well as his subsequent citation for contempt, did attract

[7] Both lower courts found that petitioner became a public figure at the time of his contempt citation in 1958. See 188 U. S. App. D. C., at 189, 578 F. 2d, at 431; 429 F. Supp., at 176–177. Petitioner argued below that even if he was once a public figure, the passage of time has restored him to the status of a private figure for purposes of the First Amendment. Both the District Court and the Court of Appeals rejected this argument. 188 U. S. App. D. C., at 189, 578 F. 2d, at 431; 429 F. Supp., at 178. And petitioner has abandoned the argument in this Court. Reply Brief for Petitioner 5–6, n. 8; Tr. of Oral Arg. 10. Because petitioner does not press the issue in this Court and because we conclude that petitioner was not a public figure in 1958, we need not and do not decide whether or when an individual who was once a public figure may lose that status by the passage of time.

[8] It is difficult to determine with precision the "public controversy" into which petitioner is alleged to have thrust himself. Certainly, there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible United States citizens understandably were and are opposed to it. Respondents urge, and the Court of Appeals apparently agreed, that the public controversy involved the propriety of the actions of law enforcement officials in investigating and prosecuting suspected Soviet agents. 188 U. S. App. D. C., at 189, 578 F. 2d, at 431; Brief for Respondents 26–27; Tr. of Oral Arg. 27–29. We may accept, *arguendo,* respondents' characterization of the "public controversy" involved in this case, for it is clear that petitioner fails to meet the other criteria established in *Gertz* for public-figure status.

media attention. But the mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, is not decisive on the question of public-figure status. In *Gertz*, we held that an attorney was not a public figure even though he voluntarily associated himself with a case that was certain to receive extensive media exposure. 418 U. S., at 352. We emphasized that a court must focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Ibid.* In *Gertz*, the attorney took no part in the criminal prosecution, never discussed the litigation with the press, and limited his participation in the civil litigation solely to his representation of a private client. *Ibid.* Similarly, petitioner never discussed this matter with the press and limited his involvement to that necessary to defend himself against the contempt charge. It is clear that petitioner played only a minor role in whatever public controversy there may have been concerning the investigation of Soviet espionage. We decline to hold that his mere citation for contempt rendered him a public figure for purposes of comment on the investigation of Soviet espionage.

Petitioner's failure to appear before the grand jury and citation for contempt no doubt were "newsworthy," but the simple fact that these events attracted media attention also is not conclusive of the public-figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 44 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today. A libel defendant must show more than mere newsworthiness to

justify application of the demanding burden of *New York Times*. See *Time, Inc.* v. *Firestone*, 424 U. S., at 454.

Nor do we think that petitioner engaged the attention of the public in an attempt to influence the resolution of the issues involved. Petitioner assumed no "special prominence in the resolution of public questions." See *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 351. His failure to respond to the grand jury's subpoena was in no way calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue. He did not in any way seek to arouse public sentiment in his favor and against the investigation. Thus, this is not a case where a defendant invites a citation for contempt in order to use the contempt citation as a fulcrum to create public discussion about the methods being used in connection with an investigation or prosecution. To the contrary, petitioner's failure to appear before the grand jury appears simply to have been the result of his poor health. 429 F. Supp., at 177 n. 33; App. 91–92 (affidavit of petitioner, June 15, 1976). He then promptly communicated his desire to testify and, when the offer was rejected, passively accepted his punishment. There is no evidence that petitioner's failure to appear was intended to have, or did in fact have, any effect on any issue of public concern. In short, we find no basis whatsoever for concluding that petitioner relinquished, to any degree, his interest in the protection of his own name.

This reasoning leads us to reject the further contention of respondents that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction. Brief for Respondents 24; Tr. of Oral Arg. 15, 17. We declined to accept a similar argument in *Time, Inc.* v. *Firestone, supra*, at 457, where we said:

> "[W]hile participants in some litigation may be legitimate 'public figures,' either generally or for the limited

> purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. The public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting Co.* [v. *Cohn*, 420 U. S. 469 (1975)]. As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection . . . , we think *Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault."

We think that these observations remain sound, and that they control the disposition of this case. To hold otherwise would create an "open season" for all who sought to defame persons convicted of a crime.

Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL joins, concurring in the result.

I agree that petitioner is not a "public figure" for purposes of this case. The Court reaches this conclusion by reasoning that a prospective public figure must enter a controversy "in an attempt to influence the resolution of the issues involved," *ante*, at 168, and that petitioner failed to act in that manner purposefully here. The Court seems to hold, in other words, that a person becomes a limited-issue public figure only if he literally or figuratively "mounts a rostrum" to advocate a particular view.

I see no need to adopt so restrictive a definition of "public figure" on the facts before us. Assuming, *arguendo*, that petitioner gained public-figure status when he became involved in the espionage controversy in 1958, he clearly had lost that distinction by the time respondents published KGB in 1974. Because I believe that the lapse of the intervening 16 years renders consideration of this petitioner's original public-figure status unnecessary, I concur only in the result.*

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), this Court held that a person may become a public figure for a limited range of issues if he "voluntarily injects himself or is drawn into a particular public controversy." *Id.*, at 351. Such a person, the Court reasoned, resembles a public official in that he typically enjoys "significantly greater access to the channels of effective communication" and knowingly "runs the risk of closer public scrutiny" than would have been true had he remained in private life. *Id.*, at 344. The passage of time, I believe, often will be relevant in deciding whether a person possesses these two public-figure characteristics. First, a lapse of years between a controversial event and a libelous utterance may diminish the defamed party's access to the means of counterargument. At the height of the publicity

*The Court notes, *ante*, at 166 n. 7, that petitioner at oral argument here disclaimed the contention that the passage of time had restored him to private status, electing to place all his eggs in the more expansive basket that forms the framework of the Court's opinion. Petitioner proffered this contention in both the District Court and the Court of Appeals, however, and both courts expressly considered it. 429 F. Supp. 167, 178 (1977); 188 U. S. App. D. C. 185, 189, 578 F. 2d 427, 431 (1978). Under these circumstances, petitioner's tactical decision does not foreclose the "passage of time" rationale as a *ratio decidendi*. Indeed, petitioner makes the related argument that, if he should be deemed a public figure, the passage of time would be relevant in determining whether respondents' failure to investigate amounted in this case to "actual malice." Reply Brief for Petitioner 5–6, n. 8; Tr. of Oral Arg. 10–12.

surrounding the espionage controversy here, petitioner may well have had sufficient access to the media effectively to rebut a charge that he was a Soviet spy. It would strain credulity to suggest that petitioner could have commanded such media interest when respondents published their book in 1974. Second, the passage of time may diminish the "risk of public scrutiny" that a putative public figure may fairly be said to have assumed. In ignoring the grand jury subpoena in 1958, petitioner may have anticipated that his conduct would invite critical commentary from the press. Following the contempt citation, however, petitioner "succeeded for the most part in returning to . . . private life." *Ante*, at 163. Any inference that petitioner "assumed the risk" of public scrutiny in 1958 assuredly is negated by his conscious efforts to regain anonymity during the succeeding 16 years.

This analysis implies, of course, that one may be a public figure for purposes of contemporaneous reporting of a controversial event, yet not be a public figure for purposes of historical commentary on the same occurrence. Historians, consequently, may well run a greater risk of liability for defamation. Yet this result, in my view, does no violence to First Amendment values. While historical analysis is no less vital to the marketplace of ideas than reporting current events, historians work under different conditions than do their media counterparts. A reporter trying to meet a deadline may find it totally impossible to check thoroughly the accuracy of his sources. A historian writing *sub specie aeternitatis* has both the time for reflection and the opportunity to investigate the veracity of the pronouncements he makes.

For these reasons, I conclude that the lapse of 16 years between petitioner's participation in the espionage controversy and respondents' defamatory reference to it was sufficient to erase whatever public-figure attributes petitioner once may have possessed. Because petitioner clearly was a private

individual in 1974, I see no need to decide the more difficult question whether he was a public figure in 1958.

MR. JUSTICE BRENNAN, dissenting.

I dissent. I agree with the holding of the District Court, 429 F. Supp. 167, 176 (1977), affirmed by the Court of Appeals, 188 U. S. App. D. C. 185, 189, 578 F. 2d 427, 431 (1978), that petitioner qualified "as a public figure for the limited purpose of comment on his connection with, or involvement in, espionage in the 1940's and '50's." I further agree with the holding of the District Court, 429 F. Supp., at 178, affirmed by the Court of Appeals, 188 U. S. App. D. C., at 189, 578 F. 2d, at 431, that petitioner also qualified as a public figure in 1974. That conclusion follows, in my view, for the reasons stated by the Court of Appeals, *ibid.*, 578 F. 2d, at 431: "The issue of Soviet espionage in 1958 and of Wolston's involvement in that operation continues to be a legitimate topic of debate today, for that matter concerns the security of the United States. The mere lapse of time is not decisive."

I disagree, however, with the holding of the District Court, affirmed by the Court of Appeals, that respondent Barron was entitled to summary judgment. In my view the evidence raised a genuine issue of fact respecting the existence of actual malice on his part. I would therefore reverse the judgment of the Court of Appeals and remand to the District Court for trial of that issue.

Syllabus

LEROY, ATTORNEY GENERAL OF IDAHO, ET AL. *v.* GREAT WESTERN UNITED CORP.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-759. Argued April 17, 1979—Decided June 26, 1979

After publicly announcing its intent to make a tender offer to purchase shares of stock of a company having substantial assets in Idaho, appellee, a Texas-based corporation which is also engaged in business in New York and Maryland, filed the informational schedule with the Securities and Exchange Commission required by the Securities Exchange Act of 1934 (1934 Act), as amended by the Williams Act, and also filed documents in Idaho in an attempt to satisfy that State's takeover statute. When Idaho officials objected to the filing and delayed the effective date of the tender offer, appellee brought an action in the Federal District Court for the Northern District of Texas against the officials responsible for enforcing Idaho's takeover law, seeking a declaration that the state law was invalid insofar as it purported to apply to interstate tender offers to purchase securities traded on a national exchange. The District Court held that personal jurisdiction over the Idaho defendants had been obtained under the Texas long-arm statute, and that venue could be sustained under the special venue provision in § 27 of the 1934 Act giving federal district courts exclusive jurisdiction of actions brought to enforce "any liability or duty created" by the Act. The court then went on to hold that the Idaho takeover statute was pre-empted by the Williams Act and placed an impermissible burden on interstate commerce. The Court of Appeals affirmed, holding, *inter alia*, that venue was authorized by § 27 of the 1934 Act, because Idaho's enforcement attempt, by conflicting with the Williams Act, constituted a violation of a "duty" imposed by § 28 (a) of the 1934 Act (which provides that nothing in the Act shall affect a state securities regulatory agency's jurisdiction over any security or person insofar as it does not conflict with the Act), and that venue was also proper under 28 U. S. C. § 1391 (b) (which permits actions not founded solely on diversity of citizenship to be brought in the district where all defendants reside or "in which the claim arose") because the allegedly invalid restraint against appellee occurred in the Northern District of Texas and that was accordingly the district "in which the claim arose."

Held:

1. There is a sound prudential justification in this case for reversing the normal order of considering personal jurisdiction in advance of venue, since otherwise this Court would have to decide a constitutional law question not previously decided as to whether personal jurisdiction was properly obtained under the Texas long-arm statute. Pp. 180–181.

2. Venue was improper under § 27 of the 1934 Act because § 28 (a) of that Act imposed no duty on the Idaho officials. Pp. 181–182.

3. Nor was venue available in the Northern District of Texas under 28 U. S. C. § 1391 (b). The District of Idaho, where the actions forming the basis for appellee's claim took place, is the only one in which "the claim arose" within the meaning of § 1391 (b). Pp. 183–187.

577 F. 2d 1256, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 187.

Peter E. Heiser, Jr., Special Deputy Attorney General of Idaho, argued the cause and filed briefs for appellants.

Ivan Irwin, Jr., argued the cause for appellee. With him on the brief were *A. B. Conant, Jr.*, and *James William Moore*.

Amy Juviler, Assistant Attorney General, argued the cause for the State of New York et al. as *amici curiae* urging reversal. With her on the brief were *Robert Abrams*, Attorney General, and *Shirley Adelson Siegel*, Solicitor General.

Deputy Solicitor General Easterbrook argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Elinor Hadley Stillman*, and *Ralph C. Ferrara*.*

*Briefs of *amici curiae* urging reversal were filed by *George Deukmejian*, Attorney General of California, *Arthur C. DeGoede*, Assistant Attorney General, and *Philip C. Griffin* and *Ronald V. Thunen, Jr.*, Deputy Attorneys General; *Michael T. Greely*, Attorney General of Montana; *Rufus L. Edmisten*, Attorney General of North Carolina, and *Rudolph A. Ashton III*, Assistant Attorney General; and *N. Jerome Diamond*, Attorney General of Vermont, for the States of California et al.; by *Theodore L. Sendak*, At-

MR. JUSTICE STEVENS delivered the opinion of the Court.

An Idaho statute imposes restrictions on certain purchasers of stock in corporations having substantial assets in Idaho. The questions presented by this appeal are whether the state agents responsible for enforcing the statute may be required to defend its constitutionality in a Federal District Court in Texas and, if so, whether the statute conflicts with the Williams Act amendments to the Securities Exchange Act of 1934,[1] or with the Commerce Clause of the United States Constitution.[2]

Sunshine Mining and Metal Co. (Sunshine) is a "target company" within the meaning of the Idaho Corporate Takeover Act—a statute designed to regulate takeovers of corporations that have certain connections to the State.[3] Sunshine's principal business is a silver mining operation in the Coeur

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torney General, *William G. Mundy*, Assistant Attorney General, and *Donald P. Bogard* for the State of Indiana; by *Francis X. Bellotti*, Attorney General, and *William M. O'Brien*, Special Assistant Attorney General, for the Commonwealth of Massachusetts; by *William J. Brown*, Attorney General, and *Donald A. Antrim*, Special Assistant Attorney General, for the State of Ohio; by *Robert B. Hansen*, Attorney General, *Michael L. Deamer*, Chief Deputy Attorney General, and *Donald B. Holbrook* for the State of Utah; and by *Jon S. Hanson* and *Richard A. Hemmings* for the National Association of Insurance Commissioners.

[1] 82 Stat. 454; see 15 U. S. C. §§ 78m (d), 78m (e), 78n (d)–78n (f).

[2] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U. S. Const., Art. I, § 8.

[3] Chapter 15 of Title 30 of the Idaho Code is entitled "Corporate Takeovers." Its opening provision contains the following definition:

" 'Target company' means a corporation or other issuer of securities which is organized under the laws of this state or has its principal office in this state, *which has substantial assets located in this state*, whose equity securities of any class are or have been registered under chapter 14, title 30, Idaho Code, or predecessor laws or section 12 of the Securities Exchange Act of 1934, and which is or may be involved in a take-over offer relating to any class of its equity securities." Idaho Code § 30–1501 (6) (Supp. 1979) (emphasis added).

d'Alene Mining District in Idaho. Its executive offices and most of its assets are located in the State. Sunshine is also engaged in business in New York and, through a subsidiary, in Maryland. Its stock is traded over the New York Stock Exchange, and its shareholders are dispersed throughout the country. App. 36. It is a Washington corporation. *Great Western United Corp.* v. *Kidwell*, 439 F. Supp. 420, 423–424.

Great Western United Corp. (Great Western) is an "offeror" within the meaning of the Idaho statute.[4] Great Western is a publicly owned Delaware corporation with executive headquarters in Dallas, Tex., and corporate offices in Denver, Colo. App. 131. In early 1977, Great Western decided to make a public offer to purchase 2 million shares of Sunshine stock for a premium price. Because consummation of the proposed tender offer would cause Great Western to own more than 5% of Sunshine's outstanding shares, Great Western was required to comply with certain provisions of the Williams Act and arguably also to comply with the Idaho Corporate Takeover Act as well as with similar provisions of New York and Maryland.

On March 21, 1977, Great Western publicly announced its intent to make a tender offer for 2 million shares of Sunshine, and its representatives took simultaneous steps to implement the proposed tender offer. They filed a Schedule 13D with the Securities and Exchange Commission in Washington, D. C.,

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[4] " 'Offeror' means a person who makes or in any way participates in making a take-over offer, and includes all affiliates and associates of that person, and all persons acting jointly or in concert for the purpose of acquiring, holding or disposing of or exercising any voting rights attached to the equity securities for which a take-over offer is made.

. . . . .

" 'Take-over offer' means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after the acquisition thereof the offeror would be directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer." §§ 30–1501 (3), (5) (Supp. 1979).

disclosing the information required by the Williams Act. They consulted with state officials in Idaho, New York, and Maryland about compliance with the corporate takeover laws of those States. And they filed documents with the Idaho Director of Finance in an attempt to satisfy Idaho's statute.

On March 25, 1977, Melvin Baptie, who was then the Deputy Administrator of Securities of the Idaho Department of Finance, sent a telecopy letter of objections to Great Western's filing to the company's offices in Dallas. The letter stated that certain pages of Great Western's SEC Form 13D were missing, asked for several additional items of information, and indicated that no hearing would be scheduled, nor other action taken, until all of the requested information had been received. App. to Juris. Statement A–156 to A–164. On the same day, Tom McEldowney, the Director of Finance of Idaho, entered an order delaying the effective date of the tender offer. *Id.*, at A–165 to A–166. Great Western made no response to Baptie's letter or to McEldowney's order.

On March 28, 1977, Great Western filed this action in the United States District Court for the Northern District of Texas, naming as defendants the state officials responsible for enforcing the Idaho, New York, and Maryland takeover laws. The complaint prayed for a declaration that the state laws were invalid insofar as they purported to apply to interstate cash tender offers to purchase securities traded on the national exchange. App. 1–36. The claims against the Maryland and New York defendants were dismissed because the former did not attempt to enforce their statute against Great Western and the latter expressly stated that they would not assert jurisdiction over the proposed tender offer. 439 F. Supp., at 428–429. The two Idaho defendants—McEldowney, the Director of Finance, and Wayne Kidwell, then Attorney General of the State [5]—appeared specially to contest jurisdiction and

[5] Baptie, who wrote the letter of comment on March 25, 1977, was not named as a defendant. David H. Leroy has now replaced Kidwell as Attorney General of the State.

venue, and later filed an answer contesting the merits of the claim.

The District Court found four separate statutory bases for federal jurisdiction.[6] It held that personal jurisdiction over the Idaho defendants had been obtained by service pursuant to the Texas long-arm statute.[7] It concluded, however, that venue was improper under the general federal venue statute, 28 U. S. C. § 1391 (b),[8] because the defendants obviously did not reside in Texas and the claim arose in Idaho rather than in Texas. Nonetheless, it decided that venue could be sustained under the special venue provision in § 27 of the Securities Exchange Act of 1934 (1934 Act). 48 Stat. 902, as amended, 15 U. S. C. § 78aa. See nn. 9 and 10, *infra*, and accompanying text.

On the merits, the District Court held that the Idaho Corporate Takeover Act is pre-empted by the Williams Act and places an impermissible burden on interstate commerce. It granted injunctive relief that enabled Great Western to acquire the desired Sunshine shares in the fall of 1977. 439 F. Supp., at 434–440. That acquisition did not moot the case, however, because the question whether Great Western has violated Idaho's statute will remain open unless and until the District Court's judgment is finally affirmed.

A divided panel of the Court of Appeals for the Fifth Circuit affirmed. The court sustained federal subject-matter

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[6] "The Court has subject matter jurisdiction over this case on four bases: 28 U. S. C. § 1331 (general federal question), 28 U. S. C. § 1332 (diversity), 28 U. S. C. § 1337 (acts affecting commerce) and Section 27 of the [Securities Exchange Act of 1934, 15 U. S. C. § 78aa]." 439 F. Supp., at 430.

[7] Tex. Rev. Civ. Stat. Ann., Art. 2031b (Vernon 1964).

[8] Section 1391 (b) provides:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

jurisdiction on the same four grounds relied upon by the District Court. See n. 6, *supra*. It then advanced alternative theories in support of both its determination that the District Court had personal jurisdiction over the defendants and its conclusion that venue lay in the Northern District of Texas. First, it noted that the Texas long-arm statute authorized the assertion of personal jurisdiction over nonresidents to the fullest extent allowable under the Due Process Clause of the Fourteenth Amendment. It then held that an Idaho official who seeks to enforce an Idaho statute to prevent a Texas-based corporation from proceeding with a national tender offer has sufficient contacts with Texas to support jurisdiction. Second, it held that jurisdiction was available under § 27 of the 1934 Act,[9] which gives the federal district courts exclusive jurisdiction over suits brought "to enforce any . . . duty created" by the Act. It based this holding on the theory that Idaho's enforcement attempts, by conflicting with the Williams Act, constituted a violation of a "duty" imposed by § 28 (a) of the 1934 Act.[10] It relied on the same reasoning to sup-

[9] "The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity or actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. . . ." 15 U. S. C. § 78aa.

[10] Section 28 (a), as set forth in 15 U. S. C. § 78bb (a), provides in pertinent part:

"Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

port its conclusion that venue was authorized by § 27 of the 1934 Act. Finally, disagreeing with the District Court, the Court of Appeals concluded that venue in the Northern District of Texas was also proper under the general federal venue provision, 28 U. S. C. § 1391 (b), because the allegedly invalid restraint against Great Western occurred there and it was accordingly "the judicial district . . . in which the claim arose." *Great Western United Corp.* v. *Kidwell,* 577 F. 2d 1256, 1265–1274. On the merits, the Court of Appeals agreed with the analysis of the District Court. *Id.,* at 1274–1287.

We noted probable jurisdiction of the appeal. 439 U. S. 1065. Without reaching either the merits or the constitutional question arising out of the attempt to assert personal jurisdiction over appellants, we now reverse because venue did not lie in the Northern District of Texas.

I

The question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum. See generally C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3801, pp. 5–6 (1976) (hereinafter Wright, Miller, & Cooper). On the other hand, neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties. See *Olberding* v. *Illinois Central R. Co.,* 346 U. S. 338, 340; *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 167–168. Accordingly, when there is a sound prudential justification for doing so, we conclude that a court may reverse the normal order of considering personal jurisdiction and venue.

Such a justification exists in this case. Although for the reasons discussed in Part II, *infra,* it is clear that § 27 of the 1934 Act does not provide a basis for personal jurisdiction, the

question whether personal jurisdiction was properly obtained pursuant to the Texas long-arm statute is more difficult. Indeed, because the Texas Supreme Court has construed its statute as authorizing the exercise of jurisdiction over nonresidents to the fullest extent permitted by the United States Constitution,[11] resolution of this question would require the Court to decide a question of constitutional law that it has not heretofore decided. As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions. We find it appropriate to pretermit the constitutional issue in this case because it is so clear that venue was improper either under § 27 of the 1934 Act or under § 1391 (b) of the Judicial Code.

II

The linchpin of Great Western's argument that venue is provided by § 27 of the 1934 Act is its interpretation of § 28 (a) of that Act. See nn. 9, 10, *supra*. It reads § 28 (a) as imposing an affirmative "duty" on the State of Idaho, the violation of which may be redressed in the federal courts under § 27. As Mr. Justice Frankfurter said of a similar argument in a similar case, however, "[t]his is a horse soon curried." *Olberding, supra,* at 340.

The reference in § 27 to the "liabilit[ies] or dut[ies] created by this chapter" clearly corresponds to the various provisions in the 1934 Act that explicitly establish duties for certain participants in the securities market or that subject such persons

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[11] *E. g., U-Anchor Advertising, Inc.* v. *Burt,* 553 S. W. 2d 760 (Tex. 1977). Appellants argue that this construction is only applicable to private commercial defendants and should not govern either in a suit against the agents of another sovereign State or in one against persons who are not engaged in commercial endeavors. Both the District Court and the Court of Appeals, however, have concluded that the statute does extend to the limits of the Due Process Clause in this case, and it is not our practice to re-examine state-law determinations of this kind. *E. g., Butner* v. *United States,* 440 U. S. 48, 57–58; *Bishop* v. *Wood,* 426 U. S. 341, 345–346, and n. 8; *Propper* v. *Clark,* 337 U. S. 472, 486–487.

to possible actions brought by the Government, the Securities and Exchange Commission, or private litigants.[12] Section 28 (a) is not such a provision. There is nothing in its text or its legislative history to suggest that it imposes any duty on the States or that indicates who might enforce any such duty. The section was plainly intended to protect, rather than to limit, state authority.[13] Because § 28 (a) imposed no duty on appellants, the argument that § 27 establishes venue in the District Court is unsupportable.[14]

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[12] *E. g.*, § 14 (a) of the 1934 Act, 15 U. S. C. § 78n (a) ("It shall be *unlawful* for any person . . . to solicit any proxy . . . in contravention of such rules and regulations as the Commission may prescribe . . .") (emphasis added); § 16 (b), 15 U. S. C. § 78p (b) ("For the purpose of preventing the unfair use of information which may have been obtained by [the] beneficial owner [of 10% of any class of equity security], director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, *shall inure to and be recoverable by the issuer* . . .") (emphasis added); § 17 (a)(1), as set forth in 15 U. S. C. § 78q (a)(1) ("Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer, registered securities information processor, registered transfer agent, and registered clearing agency . . . *shall* make and keep . . . such records . . . and make . . . such reports as the Commission, by rule, prescribes . . .") (emphasis added).

[13] Thomas Corcoran, a principal draftsman of the 1934 Act, indicated to Congress that the purpose of § 28 (a) was to leave the States with as much leeway to regulate securities transactions as the Supremacy Clause would allow them in the absence of such a provision. Hearings on S. Res. 84 (72d Cong.), 56, and 97 (73d Cong.) before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 6577 (1934). In particular, the provision was designed to save state blue-sky laws from preemption. See *ibid.*

[14] When one considers the straightforward language of §§ 27 and 28 (a), it is difficult to regard MR. JUSTICE WHITE's ingenuous and intricate argu-

III

Nor, as the District Court correctly concluded, is venue available under § 1391 (b). The first test of venue under that provision—the residence of the defendants—obviously points to Idaho rather than Texas. The Court of Appeals reasoned, however, under the second relevant test that the claim arose in Dallas because that is the place where the Idaho officials "invalidly prevented Great Western from initiating a tender offer for Sunshine." 577 F. 2d, at 1273.[15] The court buttressed its conclusion by noting that a single action against the officials of New York, Maryland, and Idaho could not have been instituted in any one place unless the claim was treated as having arisen in Dallas. *Ibid.*

The easiest answer to this latter argument is that Great Western's complaint did not in fact raise justiciable claims against any officials save those in Idaho. But that is not the only answer. Although the legal issues raised in the complaint challenging the constitutionality of the statutes of three different States were similar, and the convenience of Great Western would obviously be served by consolidating the three claims for trial in one district, the general venue statute does not authorize the plaintiff to rely on either of those reasons to justify its choice of forum.

In most instances, the purpose of statutorily specified venue

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ment as a realistic reflection of the actual intent of the legislators who enacted these provisions.

Nor is the breadth of the venue created by § 27, see *post*, at 188–189, citing *Ritter* v. *Zuspan*, 451 F. Supp. 926, 928 (ED Mich. 1978), a sufficient reason for assuming that that section, rather than some narrower venue provision, applies whenever a suit involves the 1934 Act. See *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148.

[15] The Court of Appeals properly concluded that the determination of where "the claim arose" for purposes of federal venue under § 1391 is a federal question whose answer depends on federal law. See cases cited in 1 J. Moore, Federal Practice ¶ 0.142 [5.–2], pp. 1429–1430 (1979); Wright, Miller, & Cooper § 3803, pp. 10–13.

is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial.[16] For that reason, Congress has generally not made the residence of the plaintiff a basis for venue in nondiversity cases. But cf. 28 U. S. C. § 1391 (e). The desirability of consolidating similar claims in a single proceeding may lead defendants, such perhaps as the New York and Maryland officials in this case, to waive valid objections to otherwise improper venue. But that concern does not justify reading the statute to give the plaintiff the right to select the place of trial that best suits his convenience. So long as the plain language of the statute does not open the severe type of "venue gap" that the amendment giving plaintiffs the right to proceed in the district where the claim arose was designed to close,[17] there is no reason to read it more broadly on behalf of plaintiffs.[18]

Moreover, the plain language of § 1391 (b) will not bear the Court of Appeals' interpretation. The statute allows venue in "the judicial district . . . in which the claim arose." Without deciding whether this language adopts the occa-

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[16] See *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 493–494; *Denver & R. G. W. R. Co.* v. *Railroad Trainmen*, 387 U. S. 556, 560; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 168; *Reuben H. Donnelley Corp.* v. *FTC*, 580 F. 2d 264, 269 (CA7 1978).

[17] See *Brunette Machine Works* v. *Kockum Industries*, 406 U. S. 706, 710, and n. 8. As *Brunette* indicates, the amendment of § 1391 to provide for venue where the claim arose was designed to close the "venue gaps" that existed under earlier versions of the statute in situations in which joint tortfeasors, or other multiple defendants who contributed to a single injurious act, could not be sued jointly because they resided in different districts. 406 U. S., at 710 n. 8. In this case, by contrast, Great Western has attempted to join in one suit three separate claims—each challenging a different statute—against three sets of defendants from three States. The statute simply does not contemplate such a choice on the part of plaintiffs.

[18] "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding* v. *Illinois Central R. Co.*, 346 U. S. 338, 340.

sionally fictive assumption that a claim may arise in only one district,[19] it is absolutely clear that Congress did not intend to provide for venue at the residence of the plaintiff or to give that party an unfettered choice among a host of different districts. *Denver & R. G. W. R. Co.* v. *Railroad Trainmen,* 387 U. S. 556, 560. Rather, it restricted venue either to the residence of the defendants or to "a place which may be more convenient to the litigants"—*i. e.,* both of them—"or to the witnesses who are to testify in the case." S. Rep. No. 1752, 89th Cong., 2d Sess., 3 (1966). See *Denver & R. G. W. R. Co., supra,* at 560. See also *Brunette Machine Works* v. *Kockum Industries,* 406 U. S. 706, 710. In our view, therefore, the broadest interpretation of the language of § 1391 (b) that is even arguably acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district,[20] a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility—in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but *not* of the plaintiff)—may be assigned as the locus of the claim. Cf. *Braden* v. *30th Judicial Circuit Court of Ky.,* 410 U. S. 484, 493–494.

This case is not, however, unusual. For the claim involved has only one obvious locus—the District of Idaho. Most importantly, it is action that was taken in Idaho by Idaho residents—the enactment of the statute by the legislature, the review of Great Western's filing, the forwarding of the comment letter by Deputy Administrator Baptie, and the entry of the order postponing the effective date of the tender by Finance Director McEldowney—as well as the future action that may be taken in the State by its officials to punish

[19] The two sides of this question, and the cases supporting each, are discussed in 1 Moore, *supra* n. 15, at ¶ 0.142 [5.–2], pp. 1426–1435; Wright, Miller, & Cooper § 3806, pp. 28–34.

[20] See ALI, Study of Division of Jurisdiction Between State and Federal Courts, Commentary 136–137 (1969).

or to remedy any violation of its law, that provides the basis for Great Western's federal claim. For this reason, the bulk of the relevant evidence and witnesses—apart from employees of the plaintiff, and securities experts who come from all over the United States [21]—is also located in the State. Less important, but nonetheless relevant, the nature of this action challenging the constitutionality of a state statute makes venue in the District of Idaho appropriate. The merits of Great Western's claims may well depend on a proper interpretation of the State's statute, and federal judges sitting in Idaho are better qualified to construe Idaho law, and to assess the character of Idaho's probable enforcement of that law, than are judges sitting elsewhere. See cases cited in n. 11, *supra*.

We therefore reject the Court of Appeals' reasoning that the "claim arose" in Dallas because that is where Great Western proposed to initiate its tender offer, and that is where Idaho's statute had its impact on Great Western. Aside from the fact that these "contacts" between the "claim" and the Texas District fall far short of those connecting the claim and the Idaho District, we note that this reasoning would subject the Idaho officials to suit in almost every district in the country. For every prospective offeree—be he in New York, Los Angeles, Miami, or elsewhere, rather than in Dallas—could argue with equal force (or Great Western could argue on his behalf) that he had intended to direct his local broker to accept the tender and was frustrated in that desire by the Idaho law.[22] As we noted above, however, such a reading of § 1391 (b) is inconsistent with the underlying purpose of the provision, for it would leave the venue decision entirely in the hands of plaintiffs, rather than making it "primarily a matter

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[21] At the trial held in the Northern District of Texas, the witness roster, in addition to various Idaho officials and Great Western employees from Dallas, mainly included experts from the New York area as well as one each from California, Maryland, Texas, and Wisconsin. App. 100–292.

[22] Sunshine's shareholders are located in 49 States as well as the District of Columbia and Puerto Rico. *Id.*, at 36.

of convenience of litigants and witnesses." *Denver & R. G. W. R. Co., supra,* at 560.[23] In short, the District of Idaho is the only one in which "the claim arose" within the meaning of § 1391 (b).

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

When Great Western proposed in Dallas, Tex., to make a cash tender offer for up to two million shares of Sunshine, officials in Idaho, Maryland, and New York indicated that the offer would be subject to the corporate takeover statute of each State. Having complied with the provisions of the Williams Act governing tender offers and believing that extraterritorial application of the additional requirements of the state statutes was pre-empted by and in conflict with the federal statute, Great Western brought suit in Federal District Court for the Northern District of Texas for declaratory and injunctive relief against enforcement of the state statutes. Because I conclude that venue in that District and personal jurisdiction over the defendant state officials were authorized by § 27 of the Securities Exchange Act of 1934, 15 U. S. C. § 78aa, I disagree with the Court's disposition of this appeal and would reach the merits of Great Western's contention that Idaho's statute is pre-empted by the Williams Act.

I

The Williams Act was enacted in the form of a set of amendments to the Securities Exchange Act, which, like the

[23] In *Denver & R. G. W. R. Co.,* the Court concluded that the drafters of § 1391 (b) did not intend to provide venue in suits against unincorporated associations in every district in which a member of the association resided. To do so, it noted, would give the plaintiff an unrestrained choice of venues and would accordingly be "patently unfair" to the defendant. 387 U. S., at 560. A like reasoning is controlling here.

Securities Act of 1933, contains its own venue provision. Section 27 prescribes two separate requirements—one relating to the attributes of the judicial district in which suit is brought, and the second relating to the nature of the suit. I consider these in turn.

A

Comparison of the terms of § 27 with the terms of the general federal venue statute, 28 U. S. C. § 1391 (b), shows the relative ease with which venue may be obtained in suits brought under the Securities Exchange Act. Whereas under § 1391 (b) venue is proper only in a judicial district that is either where (a) the defendant(s) reside, or (b) "the claim arose," under § 27 suit may be brought in any district that is either where (a) the defendant may be found, is an inhabitant, or transacts business, or (b) "any act or transaction constituting the violation occurred." As the majority notes, some courts have been reluctant to embrace the view that a claim may arise in more than one district for purposes of § 1391 (b). On the other hand, it has been widely accepted that there may be more than one district where acts constituting a violation may occur for purposes of § 27, and indeed that the act on which venue is predicated need be only a "material" part of an alleged violation of the Securities Exchange Act.[1] "Without question, the intent of the venue . . . provisions of the securities laws is to grant potential plaintiffs liberal choice in their selection of a forum." *Ritter* v. *Zuspan*, 451 F. Supp. 926, 928 (ED Mich. 1978). Given the underlying policy of § 27 to confer venue in a wide variety of districts in order to ease the task of enforcement of federal securities law, it would be anomalous indeed if venue were not available in the North-

[1] See *Puma* v. *Marriott*, 294 F. Supp. 1116, 1120 (Del. 1969); *Prettner* v. *Aston*, 339 F. Supp. 273 (Del. 1972); *Mayer* v. *Development Corp. of America*, 396 F. Supp. 917, 928–930 (Del. 1975). See also *Black & Co.* v. *Nova-Tech, Inc.*, 333 F. Supp. 468 (Ore. 1971).

ern District of Texas in this case. Faced with the alternative left to it by the majority—of instituting separate suits in each State attempting to apply its extraterritorial takeover law, or perhaps waiting and defending separate enforcement actions brought by each State—Great Western might well choose to forgo its tender offer altogether, a result not in keeping with the purposes of the Williams Act or § 27. Although in this case only three States indicated an intention to assert jurisdiction over the tender offer, and only Idaho ultimately attempted to enforce its statute, it is important to note that there are analogous statutes in a total of 36 States.[2]

With the foregoing in mind, even if the claim in this case did not arise in Dallas within the meaning of § 1391 (b), Dallas is a place where an act constituting an alleged violation of the Williams Act occurred, because it is where appellants sought to apply Idaho's statute. Of course, for purposes of determining whether venue requirements were met, the substantive allegations of Great Western's claim—that is, that Idaho's statute conflicts with the Williams Act—must be accepted as true. The specific act alleged to violate a duty created by the Williams Act is the application of the Idaho statute to the Dallas tender offer. The gist of the act complained of being extraterritorial application of Idaho's statute, this act obviously occurs not only in Idaho but also in the district where the extraterritorial tender offer is made.

B

Having determined that the Northern District of Texas has the required relationship to the claim in this case, venue in that District was proper under § 27 as long as the second general requirement of the provision was met; that is, if it may be said that Great Western's suit was "to enforce any liability

[2] See Note, Securities Law and the Constitution: State Tender Offer Statutes Reconsidered, 88 Yale L. J. 510, 514–515, n. 29 (1979).

or duty created by this chapter . . . , or to enjoin any violation of such chapter . . . ." In the majority's view, the term "duty created by this chapter" means only those duties "explicitly" prescribed by a provision of the Williams Act. *Ante*, at 181–182. The majority would further restrict the term to refer only to duties imposed on "participants in the securities market," *ante*, at 181, which presumably does not include officials seeking to enforce state corporate takeover laws.

But § 27 does not provide that the duty must be "explicitly" stated in a provision of the Williams Act or that only "participants in the securities market" have duties under the Act. Rather, it broadly encompasses all suits to enforce "any . . . duty created by" the Act. Here respondent sought an injunction against enforcement of Idaho's statute as applied to its interstate tender offer, on the ground that such enforcement is pre-empted by and in conflict with the Williams Act. The only question, then, is whether the Williams Act imposes on state officials, expressly or impliedly, the duty not to enact or enforce legislation inconsistent therewith. In my view, the answer to this question must be in the affirmative. The Supremacy Clause of the Constitution provides that if state law conflicts with federal law, federal law prevails. Given this command, the very enactment and existence of the Williams Act pre-empts and invalidates all conflicting state efforts to regulate cash tender offers. Viewed from the perspective of potential offerors, the existence of the Act creates the right not to be subject to conflicting state regulation. Viewed from the perspective of state officials, the existence of the Act creates a duty not to undertake conflicting regulation efforts.

That the duty alleged to have been violated in this case would not exist in the absence of the Supremacy Clause does not make the duty any less a creation of the Williams Act. "[A]ll federal actions to enjoin a state enactment rest ultimately on the Supremacy Clause," *Swift & Co.* v. *Wickham*, 382 U. S. 111, 126 (1965), whether the substantive federal

law relied upon be a statute—as in *Swift* [3] and as in this case—or another provision of the Constitution, such as the Commerce Clause. Thus, the command of the Supremacy Clause is necessary to the authoritative assertion of any federal right or counterpart duty, and imposes the general duty not to act in a manner inconsistent with federal law. However, the specific duty alleged to have been violated in this case—not to enforce extraterritorial state takeover laws such as Idaho's—is imposed by the existence of pre-emptive federal regulation.[4] Just as various provisions of the Williams Act create certain duties on the part of participants in the securities market, the Williams Act as a whole creates the duty on the part of state officials not to regulate in a manner inconsistent with that Act.

II

Once it is determined that § 27 contemplates venue for Great Western's claim in the Northern District of Texas, the federal court in that District also had personal jurisdiction over the Idaho defendants, they having been served in a "district . . . wher[e] . . . found," there being no objection to the

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[3] A claim of pre-emption is based on an alleged violation of a federal statute. In *Swift*, appellants—poultry packing companies—alleged that "enforcement [of a New York statute's labeling requirements] would violate the . . . overriding requirements of [a federal labeling statute]." 382 U. S., at 114. Similarly, state welfare practices may be challenged on the ground that they conflict with the Social Security Act, see, *e. g.*, *Edelman* v. *Jordan*, 415 U. S. 651, 675 (1974); *Hagans* v. *Lavine*, 415 U. S. 528 (1974); *King* v. *Smith*, 392 U. S. 309, 312 n. 3 (1968).

[4] The Court of Appeals concluded that appellants' duty was created by § 28 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78bb (a). See *Great Western United Corp.* v. *Kidwell*, 577 F. 2d 1256, 1271–1272 (CA5 1978). However, the duty not to act in a manner inconsistent with the Williams Act would exist even without § 28 (a). Of course, that provision may be relevant in considering the merits of Great Western's claim of pre-emption, in that it may shed light on the nature and scope of state regulation of tender offers that would not be in conflict with the Williams Act.

manner of service of process, and there being no restrictions imposed by the Constitution on the exercise of jurisdiction by the United States over its residents, see *Fitzsimmons* v. *Barton*, 589 F. 2d 330 (CA7 1979).[5]

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[5] Appellants also raise the issue whether a tender offeror has a cause of action "under the Williams Act amendments to the Securities Exchange Act of 1934 to challenge the constitutionality of state corporate takeover laws." Juris. Statement 4. In *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 47 n. 33 (1977), we left open the question "whether as a general proposition a suit in equity for injunctive relief . . . would lie in favor of a tender offeror" under an antifraud provision of the Williams Act. See also *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 577 (1979), rejecting the notion that § 27 of the Securities Exchange Act of 1934 creates any implied cause of action. However, the complaint alleged a cause of action not only under the Williams Act and § 27, but also under 42 U. S. C. § 1983, see App. 3–4, 1[illegible]hich applies in suits against state officials. Because the pre-emption [illegible]m alleges deprivation of a right secured by a federal statute, see Part I–B of text, *supra*, it states a cause of action under the "and laws" provision of § 1983.

Syllabus

UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* WEBER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–432. Argued March 28, 1979—Decided June 27, 1979*

In 1974, petitioners United Steelworkers of America (USWA) and Kaiser Aluminum & Chemical Corp. (Kaiser) entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement included an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces by reserving for black employees 50% of the openings in in-plant craft-training programs until the percentage of black craftworkers in a plant is commensurate with the percentage of blacks in the local labor force. This litigation arose from the operation of the affirmative action plan at one of Kaiser's plants where, prior to 1974, only 1.83% of the skilled craftworkers were black, even though the local work force was approximately 39% black. Pursuant to the national agreement, Kaiser, rather than continuing its practice of hiring trained outsiders, established a training program to train its production workers to fill craft openings, selecting trainees on the basis of seniority, with the proviso that at least 50% of the trainees were to be black until the percentage of black skilled craftworkers in the plant approximated the percentage of blacks in the local labor force. During the plan's first year of operation, seven black and six white craft trainees were selected from the plant's production work force, with the most senior black trainee having less seniority than several white production workers whose bids for admission were rejected. Thereafter, respondent Weber, one of those white production workers, instituted this class action in Federal District Court, alleging that because the affirmative action program had resulted in junior black employees' receiving training in preference to senior white employees, respondent and other similarly situated white employees had been discriminated against in violation of the provisions of §§ 703 (a) and (d) of Title VII of the Civil Rights Act of 1964 that make it unlawful to "discriminate . . . because

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*Together with No. 78–435, *Kaiser Aluminum & Chemical Corp.* v. *Weber et al.*, and No. 78–436, *United States et al.* v. *Weber et al.*, also on certiorari to the same court.

of . . . race" in hiring and in the selection of apprentices for training programs. The District Court held that the affirmative action plan violated Title VII, entered judgment in favor of the plaintiff class, and granted injunctive relief. The Court of Appeals affirmed, holding that all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment.

Held:

1. Title VII's prohibition in §§ 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans. Pp. 200–208.

(a) Respondent Weber's reliance upon a literal construction of the statutory provisions and upon *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, which held, in a case not involving affirmative action, that Title VII protects whites as well as blacks from certain forms of racial discrimination, is misplaced, since the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers," *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459, and, thus, the prohibition against racial discrimination in §§ 703 (a) and (d) must be read against the background of the legislative history of Title VII and the historical context from which the Act arose. P. 201.

(b) Examination of those sources makes clear that an interpretation of §§ 703 (a) and (d) that forbids all race-conscious affirmative action would bring about an end completely at variance with the purpose of the statute and must be rejected. Congress' primary concern in enacting the prohibition against racial discrimination in Title VII was with the plight of the Negro in our economy, and the prohibition against racial discrimination in employment was primarily addressed to the problem of opening opportunities for Negroes in occupations which have been traditionally closed to them. In view of the legislative history, the very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418, cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. Pp. 201–204.

(c) This conclusion is further reinforced by examination of the language and legislative history of § 703 (j) of Title VII, which provides that nothing contained in Title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of" a *de facto* racial imbalance in the employer's work force. Had Congress meant to prohibit all race-conscious affirmative action, it could have provided that Title VII would not require or *permit* racially preferential integration efforts. The legislative record shows that § 703 (j) was designed to prevent § 703 from being interpreted in such a way as to lead to undue federal regulation of private businesses, and thus use of the word "require" rather than the phrase "require or permit" in § 703 (j) fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action. Pp. 204–207.

2. It is not necessary in these cases to define the line of demarcation between permissible and impermissible affirmative action plans; it suffices to hold that the challenged Kaiser-USWA plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute, being designed to break down old patterns of racial segregation and hierarchy, and being structured to open employment opportunities for Negroes in occupations which have been traditionally closed to them. At the same time, the plan does not unnecessarily trammel the interests of white employees, neither requiring the discharge of white workers and their replacement with new black hirees, nor creating an absolute bar to the advancement of white employees since half of those trained in the program will be white. Moreover, the plan is a temporary measure, not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Pp. 208–209.

563 F. 2d 216, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, 209. BURGER, C. J., filed a dissenting opinion, *post*, p. 216. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 219. POWELL and STEVENS, JJ., took no part in the consideration or decision of the cases.

Michael H. Gottesman argued the cause for petitioner in No. 78–432. With him on the briefs were *Robert M. Weinberg, Elliot Bredhoff, Bernard Kleiman, Carl Frankel, Jerome*

A. Cooper, John C. Falkenberry, J. Albert Woll, and *Laurence Gold. Thompson Powers* argued the cause for petitioner in No. 78–435. With him on the briefs was *Jane McGrew. Deputy Solicitor General Wallace* argued the cause for the United States et al., petitioners in No. 78–436. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Days, William C. Bryson, Brian K. Landsberg,* and *Robert J. Reinstein.*

Michael R. Fontham argued the cause and filed a brief for respondent Weber in all cases.†

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†Briefs of *amici curiae* urging reversal in all cases were filed by *Arthur Kinoy* and *Doris Peterson* for the Affirmative Action Coordinating Center et al.; by *E. Richard Larson, Burt Neuborne,* and *Frank Askin* for the American Civil Liberties Union et al.; by *Richard B. Sobol, Jerome Cohen, Harrison Combs, John Fillion, Winn Newman, Carole W. Wilson, David Rubin, John Tadlock, James E. Youngdahl, A. L. Zwerdling,* and *Janet Kohn* for the American Federation of State, County and Municipal Employees, AFL–CIO, et al.; by *Samuel Yee, Charles Stephen Ralston,* and *Bill Lann Lee* for the Asian American Legal Defense and Education Fund et al.; by *James F. Miller* and *Stephen V. Bomse* for the California Fair Employment Practice Commission et al.; by *Charles A. Bane, Thomas D. Barr, Norman Redlich, Robert A. Murphy, Richard T. Seymour, Norman J. Chachkin,* and *Richard S. Kohn* for the Lawyers' Committee for Civil Rights Under Law; by *Nathaniel R. Jones* for the National Association for the Advancement of Colored People; by *Jack Greenberg, James M. Nabrit III, Eric Schnapper, Lowell Johnston, Barry L. Goldstein, Vernon E. Jordan, Jr.,* and *Wiley A. Branton* for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., et al.; by *Herbert O. Reid* and *John W. Davis* for the National Medical Association, Inc., et al.; by *Robert Hermann* and *Evan A. Davis* for the National Puerto Rican Coalition et al.; by *Jerome Tauber* for the National Union of Hospital and Health Care Employees, RWDSU, AFL–CIO; and by *Eileen M. Stein* and *Pat Eames* for Patricia Schroeder et al. *Sybille C. Fritzsche* filed a brief for the Women's Caucus, District 31 of the United Steelworkers of America, as *amicus curiae* in No. 78–432 urging reversal.

Briefs of *amici curiae* urging affirmance in all cases were filed by *J. D. Burdick* and *Ronald E. Yank* for the California Correctional Officers Association; by *Gerard C. Smetana* for the Government Contract Employers Association; by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Challenged here is the legality of an affirmative action plan—collectively bargained by an employer and a union—that reserves for black employees 50% of the openings in an in-plant craft-training program until the percentage of black craftworkers in the plant is commensurate with the percentage of blacks in the local labor force. The question for decision is whether Congress, in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. We hold that Title VII does not prohibit such race-conscious affirmative action plans.

I

In 1974, petitioner United Steelworkers of America (USWA) and petitioner Kaiser Aluminum & Chemical Corp. (Kaiser)

Legal Foundation; by *Leonard F. Walentynowicz* for the Polish American Congress et al.; and by *Wayne T. Elliott* for the Southeastern Legal Foundation, Inc. *Jack N. Rogers* filed a brief for the United States Justice Foundation as *amicus curiae* in No. 78–432 urging affirmance.

Briefs of *amici curiae* in all cases were filed by *Vilma S. Martinez, Morris J. Baller,* and *Joel G. Contreras* for the American G. I. Forum et al.; by *Philip B. Kurland, Larry M. Lavinsky, Arnold Forster, Harry J. Keaton, Meyer Eisenberg, Justin J. Finger, Jeffrey P. Sinensky, Richard A. Weisz, Themis N. Anastos, Dennis Rapps,* and *Julian E. Kulas* for the Anti-Defamation League of B'nai B'rith et al.; by *John W. Finley, Jr., Michael Blinick, Deyan R. Brashich,* and *Eugene V. Rostow* for the Committee on Academic Nondiscrimination and Integrity; by *Kenneth C. McGuiness, Robert E. Williams,* and *Douglas S. McDowell* for the Equal Employment Advisory Council; by *Mark B. Bigelow* for the National Coordinating Committee for Trade Union Action and Democracy; by *Philips B. Patton* for the Pacific Civil Liberties League; by *Frank J. Donner* for the United Electrical, Radio and Machine Workers of America; by *Paul D. Kamenar* for the Washington Legal Foundation; and by *Gloria R. Allred* for the Women's Equal Rights Legal Defense and Education Fund. *Burt Pines* and *Cecil W. Marr* filed a brief for the city of Los Angeles as *amicus curiae* in No. 78–435.

entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement contained, *inter alia*, an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces. Black craft-hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers—black and white—the skills necessary to become craftworkers. The plan reserved for black employees 50% of the openings in these newly created in-plant training programs.

This case arose from the operation of the plan at Kaiser's plant in Gramercy, La. Until 1974, Kaiser hired as craftworkers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions,[1] few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the Gramercy plant were black,

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[1] Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. See, *e. g.*, *United States* v. *Elevator Constructors*, 538 F. 2d 1012 (CA3 1976); *Associated General Contractors of Massachusetts* v. *Altschuler*, 490 F. 2d 9 (CA1 1973); *Southern Illinois Builders Assn.* v. *Ogilvie*, 471 F. 2d 680 (CA7 1972); *Contractors Assn. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (CA3 1971); *Insulators & Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (CA5 1969); *Buckner* v. *Goodyear Tire & Rubber Co.*, 339 F. Supp. 1108 (ND Ala. 1972), aff'd without opinion, 476 F. 2d 1287 (CA5 1973). See also U. S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 58–94 (1976) (summarizing judicial findings of discrimination by craft unions); G. Myrdal, An American Dilemma 1079–1124 (1944); F. Marshall & V. Briggs, The Negro and Apprenticeship (1967); S. Spero & A. Harris, The Black Worker (1931); U. S. Commission on Civil Rights, Employment 97 (1961); State Advisory Committees, U. S. Commission on Civil Rights, 50 States Report 209 (1961); Marshall, The Negro in Southern Unions, in The Negro and the American Labor Movement 145 (J. Jacobson ed. 1968); App. 63, 104.

even though the work force in the Gramercy area was approximately 39% black.

Pursuant to the national agreement Kaiser altered its craft-hiring practice in the Gramercy plant. Rather than hiring already trained outsiders, Kaiser established a training program to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the Gramercy plant approximated the percentage of blacks in the local labor force. See 415 F. Supp. 761, 764.

During 1974, the first year of the operation of the Kaiser-USWA affirmative action plan, 13 craft trainees were selected from Gramercy's production work force. Of these, seven were black and six white. The most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected. Thereafter one of those white production workers, respondent Brian Weber (hereafter respondent), instituted this class action in the United States District Court for the Eastern District of Louisiana.

The complaint alleged that the filling of craft trainee positions at the Gramercy plant pursuant to the affirmative action program had resulted in junior black employees' receiving training in preference to senior white employees, thus discriminating against respondent and other similarly situated white employees in violation of §§ 703 (a) [2] and

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[2] Section 703 (a), 78 Stat. 255, as amended, 86 Stat. 109, 42 U. S. C. § 2000e–2 (a), provides:

"(a) . . . It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individ-

(d) [3] of Title VII. The District Court held that the plan violated Title VII, entered a judgment in favor of the plaintiff class, and granted a permanent injunction prohibiting Kaiser and the USWA "from denying plaintiffs, Brian F. Weber and all other members of the class, access to on-the-job training programs on the basis of race." App. 171. A divided panel of the Court of Appeals for the Fifth Circuit affirmed, holding that all employment preferences based upon race, including those preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment. 563 F. 2d 216 (1977). We granted certiorari. 439 U. S. 1045 (1978). We reverse.

II

We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment. Further, since the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act. The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. That question was

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ual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[3] Section 703 (d), 78 Stat. 256, 42 U. S. C. § 2000e–2 (d), provides:

"It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

expressly left open in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 281 n. 8 (1976), which held, in a case not involving affirmative action, that Title VII protects whites as well as blacks from certain forms of racial discrimination.

Respondent argues that Congress intended in Title VII to prohibit all race-conscious affirmative action plans. Respondent's argument rests upon a literal interpretation of §§ 703 (a) and (d) of the Act. Those sections make it unlawful to "discriminate . . . because of . . . race" in hiring and in the selection of apprentices for training programs. Since, the argument runs, *McDonald* v. *Santa Fe Trail Transp. Co., supra,* settled that Title VII forbids discrimination against whites as well as blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against white employees solely because they are white, it follows that the Kaiser-USWA plan violates Title VII.

Respondent's argument is not without force. But it overlooks the significance of the fact that the Kaiser-USWA plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context respondent's reliance upon a literal construction of §§ 703 (a) and (d) and upon *McDonald* is misplaced. See *McDonald* v. *Santa Fe Trail Transp. Co., supra,* at 281 n. 8. It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Holy Trinity Church* v. *United States,* 143 U. S. 457, 459 (1892). The prohibition against racial discrimination in §§ 703 (a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. See *Train* v. *Colorado Public Interest Research Group,* 426 U. S. 1, 10 (1976); *National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S. 612, 620 (1967); *United States* v. *American Trucking Assns.,* 310 U. S. 534, 543–544 (1940). Examination of those sources makes

clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected. *United States* v. *Public Utilities Comm'n*, 345 U. S. 295, 315 (1953). See *Johansen* v. *United States*, 343 U. S. 427, 431 (1952); *Longshoremen* v. *Juneau Spruce Corp.*, 342 U. S. 237, 243 (1952); *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907).

Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." *Ibid.* (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark); *id.*, at 7379–7380 (remarks of Sen. Kennedy). Because of automation the number of such jobs was rapidly decreasing. See *id.*, at 6548 (remarks of Sen. Humphrey); *id.*, at 7204 (remarks of Sen. Clark). As a consequence, "the relative position of the Negro worker [was] steadily worsening. In 1947 the nonwhite unemployment rate was only 64 percent higher than the white rate; in 1962 it was 124 percent higher." *Id.*, at 6547 (remarks of Sen. Humphrey). See also *id.*, at 7204 (remarks of Sen. Clark). Congress considered this a serious social problem. As Senator Clark told the Senate:

> "The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why the bill should pass." *Id.*, at 7220.

Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible

unless blacks were able to secure jobs "which have a future." *Id.*, at 7204 (remarks of Sen. Clark). See also *id.*, at 7379–7380 (remarks of Sen. Kennedy). As Senator Humphrey explained to the Senate:

> "What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?" *Id.*, at 6547.
>
> "Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?" *Id.*, at 6552.

These remarks echoed President Kennedy's original message to Congress upon the introduction of the Civil Rights Act in 1963.

> "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job." 109 Cong. Rec. 11159.

Accordingly, it was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.

It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem. The Report provides:

> "No bill can or should lay claim to eliminating all of

> the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*" H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963). (Emphasis supplied.)

Given this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975), cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.[4] It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Our conclusion is further reinforced by examination of the

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[4] The problem that Congress addressed in 1964 remains with us. In 1962, the nonwhite unemployment rate was 124% higher than the white rate. See 110 Cong. Rec. 6547 (1964) (remarks of Sen. Humphrey). In 1978, the black unemployment rate was 129% higher. See Monthly Labor Review, U. S. Department of Labor, Bureau of Labor Statistics 78 (Mar. 1979).

language and legislative history of § 703 (j) of Title VII.[5] Opponents of Title VII raised two related arguments against the bill. First, they argued that the Act would be interpreted to *require* employers with racially imbalanced work forces to grant preferential treatment to racial minorities in order to integrate. Second, they argued that employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act. See 110 Cong. Rec. 8618–8619 (1964) (remarks of Sen. Sparkman). Had Congress meant to prohibit all race-conscious affirmative action, as respondent urges, it easily could have answered both objections by providing that Title VII would not require or *permit* racially preferential integration efforts. But Congress did not choose such a course. Rather, Congress added § 703 (j) which addresses only the first objection. The section provides that nothing contained in Title VII "shall be interpreted to *require* any

[5] Section 703 (j) of Title VII, 78 Stat. 257, 42 U. S. C. § 2000e–2 (j), provides:

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Section 703 (j) speaks to substantive liability under Title VII, but it does not preclude courts from considering racial imbalance as evidence of a Title VII violation. See *Teamsters* v. *United States*, 431 U. S. 324, 339–340, n. 20 (1977). Remedies for substantive violations are governed by § 706 (g), 42 U. S. C. § 2000e–5 (g).

employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of" a *de facto* racial imbalance in the employer's work force. The section does *not* state that "nothing in Title VII shall be interpreted to *permit*" voluntary affirmative efforts to correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.

The reasons for this choice are evident from the legislative record. Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963). Section 703 (j) was proposed by Senator Dirksen to allay any fears that the Act might be interpreted in such a way as to upset this compromise. The section was designed to prevent § 703 of Title VII from being interpreted in such a way as to lead to undue "Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance." 110 Cong. Rec. 14314 (1964) (remarks of Sen. Miller).[6] See also *id.*, at 9881 (remarks of

[6] Title VI of the Civil Rights Act of 1964, considered in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), contains no provision comparable to § 703 (j). This is because Title VI was an exercise of federal power over a matter in which the Federal Government was already directly involved: the prohibitions against race-based conduct contained in Title VI governed "program[s] or activit[ies] receiving Federal financial assistance." 42 U. S. C. § 2000d. Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*. See 110 Cong. Rec. 8315 (1964) (remarks of Sen. Cooper). See also *id.*, at 11615 (remarks of Sen. Cooper).

Sen. Allott); *id.*, at 10520 (remarks of Sen. Carlson); *id.*, at 11471 (remarks of Sen. Javits); *id.*, at 12817 (remarks of Sen. Dirksen). Clearly, a prohibition against all voluntary, race-conscious, affirmative action efforts would disserve these ends. Such a prohibition would augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals. In view of this legislative history and in view of Congress' desire to avoid undue federal regulation of private businesses, use of the word "require" rather than the phrase "require or permit" in § 703 (j) fortifies the conclusion that Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action.[7]

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[7] Respondent argues that our construction of § 703 conflicts with various remarks in the legislative record. See, *e. g.*, 110 Cong. Rec. 7213 (1964) (Sens. Clark and Case); *id.*, at 7218 (Sens. Clark and Case); *id.*, at 6549 (Sen. Humphrey); *id.*, at 8921 (Sen. Williams). We do not agree. In Senator Humphrey's words, these comments were intended as assurances that Title VII would not allow establishment of systems "to *maintain* racial balance in employment." *Id.*, at 11848 (emphasis added). They were not addressed to temporary, voluntary, affirmative action measures undertaken to eliminate manifest racial imbalance in traditionally segregated job categories. Moreover, the comments referred to by respondent all preceded the adoption of § 703 (j), 42 U. S. C. § 2000e–2 (j). After § 703 (j) was adopted, congressional comments were all to the effect that employers would not be *required* to institute preferential quotas to avoid Title VII liability, see, *e. g.*, 110 Cong. Rec. 12819 (1964) (remarks of Sen. Dirksen); *id.*, at 13079–13080 (remarks of Sen. Clark); *id.*, at 15876 (remarks of Rep. Lindsay). There was no suggestion after the adoption of § 703 (j) that wholly voluntary, race-conscious, affirmative action efforts would in themselves constitute a violation of Title VII. On the contrary, as Representative MacGregor told the House shortly before the final vote on Title VII:

"Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover.

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People com-

We therefore hold that Title VII's prohibition in §§ 703 (a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.

III

We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).[8]

At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Cf. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273 (1976). Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the

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plain about . . . preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." 110 Cong. Rec. 15893 (1964).

[8] See n. 1, *supra*. This is not to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII.

percentage of blacks in the local labor force. See 415 F. Supp., at 763.

We conclude, therefore, that the adoption of the Kaiser-USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.[9] Accordingly, the judgment of the Court of Appeals for the Fifth Circuit is

Reversed.

MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN, concurring.

While I share some of the misgivings expressed in MR. JUSTICE REHNQUIST's dissent, *post,* p. 219, concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today, I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today, and I therefore join its opinion as well as its judgment.

I

In his dissent from the decision of the United States Court of Appeals for the Fifth Circuit, Judge Wisdom pointed out that this litigation arises from a practical problem in the administration of Title VII. The broad prohibition against discrimination places the employer and the union on what he ac-

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[9] Our disposition makes unnecessary consideration of petitioners' argument that their plan was justified because they feared that black employees would bring suit under Title VII if they did not adopt an affirmative action plan. Nor need we consider petitioners' contention that their affirmative action plan represented an attempt to comply with Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.).

curately described as a "high tightrope without a net beneath them." 563 F. 2d 216, 230. If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

In this litigation, Kaiser denies prior discrimination but concedes that its past hiring practices may be subject to question. Although the labor force in the Gramercy area was approximately 39% black, Kaiser's work force was less than 15% black, and its craftwork force was less than 2% black. Kaiser had made some effort to recruit black painters, carpenters, insulators, and other craftsmen, but it continued to insist that those hired have five years' prior industrial experience, a requirement that arguably was not sufficiently job related to justify under Title VII any discriminatory impact it may have had. See *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F. 2d 1374, 1389 (CA5 1978), cert. denied *sub nom. Steelworkers* v. *Parson*, 441 U. S. 968 (1979). The parties dispute the extent to which black craftsmen were available in the local labor market. They agree, however, that after critical reviews from the Office of Federal Contract Compliance, Kaiser and the Steelworkers established the training program in question here and modeled it along the lines of a Title VII consent decree later entered for the steel industry. See *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826 (CA5 1975). Yet when they did this, respondent Weber sued, alleging that Title VII prohibited the program because it discriminated against him as a white person and it was not supported by a prior judicial finding of discrimination against blacks.

Respondent Weber's reading of Title VII, endorsed by the Court of Appeals, places voluntary compliance with Title VII in profound jeopardy. The only way for the employer and the union to keep their footing on the "tightrope" it creates would be to eschew all forms of voluntary affirmative action. Even

a whisper of emphasis on minority recruiting would be forbidden. Because Congress intended to encourage private efforts to come into compliance with Title VII, see *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974), Judge Wisdom concluded that employers and unions who had committed "arguable violations" of Title VII should be free to make reasonable responses without fear of liability to whites. 563 F. 2d, at 230. Preferential hiring along the lines of the Kaiser program is a reasonable response for the employer, whether or not a court, on these facts, could order the same step as a remedy. The company is able to avoid identifying victims of past discrimination, and so avoids claims for backpay that would inevitably follow a response limited to such victims. If past victims should be benefited by the program, however, the company mitigates its liability to those persons. Also, to the extent that Title VII liability is predicated on the "disparate effect" of an employer's past hiring practices, the program makes it less likely that such an effect could be demonstrated. Cf. *County of Los Angeles* v. *Davis*, 440 U. S. 625, 633–634 (1979) (hiring could moot a past Title VII claim). And the Court has recently held that work-force statistics resulting from private affirmative action were probative of benign intent in a "disparate treatment" case. *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 579–580 (1978).

The "arguable violation" theory has a number of advantages. It responds to a practical problem in the administration of Title VII not anticipated by Congress. It draws predictability from the outline of present law and closely effectuates the purpose of the Act. Both Kaiser and the United States urge its adoption here. Because I agree that it is the soundest way to approach this case, my preference would be to resolve this litigation by applying it and holding that Kaiser's craft training program meets the requirement that voluntary affirmative action be a reasonable response to an "arguable violation" of Title VII.

II

The Court, however, declines to consider the narrow "arguable violation" approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is "traditionally segregated." *Ante*, at 209, and n. 9. The sources cited suggest that the Court considers a job category to be "traditionally segregated" when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category.*

"Traditionally segregated job categories," where they exist, sweep far more broadly than the class of "arguable violations" of Title VII. The Court's expansive approach is somewhat

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*The jobs in question here include those of carpenter, electrician, general repairman, insulator, machinist, and painter. App. 165. The sources cited, *ante*, at 198 n. 1, establish, for example, that although 11.7% of the United States population in 1970 was black, the percentage of blacks among the membership of carpenters' unions in 1972 was only 3.7%. For painters, the percentage was 4.9, and for electricians, 2.6. U. S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 274, 281 (1976). Kaiser's Director of Equal Opportunity Affairs testified that, as a result of discrimination in employment and training opportunity, blacks were underrepresented in skilled crafts "in every industry in the United States, and in every area of the United States." App. 90. While the parties dispute the cause of the relative underrepresentation of blacks in Kaiser's craftwork force, the Court of Appeals indicated that it thought "the general lack of skills among available blacks" was responsible. 563 F. 2d 216, 224 n. 13. There can be little doubt that any lack of skill has its roots in purposeful discrimination of the past, including segregated and inferior trade schools for blacks in Louisiana, U. S. Commission on Civil Rights, 50 States Report 209 (1961); traditionally all-white craft unions in that State, including the electrical workers and the plumbers, *id.*, at 208; union nepotism, *Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (CA5 1969); and segregated apprenticeship programs, F. Marshall & V. Briggs, The Negro and Apprenticeship 27 (1967).

disturbing for me because, as MR. JUSTICE REHNQUIST points out, the Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. While setting aside that principle can be justified where necessary to advance statutory policy by encouraging reasonable responses as a form of voluntary compliance that mitigates "arguable violations," discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted.

A closer look at the problem, however, reveals that in each of the principal ways in which the Court's "traditionally segregated job categories" approach expands on the "arguable violations" theory, still other considerations point in favor of the broad standard adopted by the Court, and make it possible for me to conclude that the Court's reading of the statute is an acceptable one.

A. The first point at which the Court departs from the "arguable violations" approach is that it measures an individual employer's capacity for affirmative action solely in terms of a statistical disparity. The individual employer need not have engaged in discriminatory practices in the past. While, under Title VII, a mere disparity may provide the basis for a prima facie case against an employer, *Dothard* v. *Rawlinson*, 433 U. S. 321, 329–331 (1977), it would not conclusively prove a violation of the Act. *Teamsters* v. *United States*, 431 U. S. 324, 339–340, n. 20 (1977); see § 703 (j), 42 U. S. C. § 2000e–2 (j). As a practical matter, however, this difference may not be that great. While the "arguable violation" standard is conceptually satisfying, in practice the emphasis would be on "arguable" rather than on "violation." The great difficulty in the District Court was that no one had any incentive to prove that Kaiser had violated the Act. Neither Kaiser nor the Steelworkers wanted to establish a past violation, nor did Weber. The blacks harmed had never sued and so had no established representative. The Equal Employment Oppor-

tunity Commission declined to intervene, and cannot be expected to intervene in every case of this nature. To make the "arguable violation" standard work, it would have to be set low enough to permit the employer to prove it without obligating himself to pay a damages award. The inevitable tendency would be to avoid hairsplitting litigation by simply concluding that a mere disparity between the racial composition of the employer's work force and the composition of the qualified local labor force would be an "arguable violation," even though actual liability could not be established on that basis alone. See Note, 57 N. C. L. Rev. 695, 714–719 (1979).

B. The Court also departs from the "arguable violation" approach by permitting an employer to redress discrimination that lies wholly outside the bounds of Title VII. For example, Title VII provides no remedy for pre-Act discrimination, *Hazelwood School District* v. *United States*, 433 U. S. 299, 309–310 (1977); yet the purposeful discrimination that creates a "traditionally segregated job category" may have entirely predated the Act. More subtly, in assessing a prima facie case of Title VII liability, the composition of the employer's work force is compared to the composition of the pool of workers who meet valid job qualifications. *Hazelwood*, 433 U. S., at 308 and n. 13; *Teamsters* v. *United States*, 431 U. S., at 339–340, and n. 20. When a "job category" is traditionally segregated, however, that pool will reflect the effects of segregation, and the Court's approach goes further and permits a comparison with the composition of the labor force as a whole, in which minorities are more heavily represented.

Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief. It seems unfair for respondent Weber to argue, as he does, that the

asserted scarcity of black craftsmen in Louisiana, the product of historic discrimination, makes Kaiser's training program illegal because it ostensibly absolves Kaiser of all Title VII liability. Brief for Respondents 60. Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of "locking in" the effects of segregation for which Title VII provides no remedy. Such a construction, as the Court points out, *ante,* at 204, would be "ironic," given the broad remedial purposes of Title VII.

MR. JUSTICE REHNQUIST's dissent, while it focuses more on what Title VII does not require than on what Title VII forbids, cites several passages that appear to express an intent to "lock in" minorities. In mining the legislative history anew, however, the dissent, in my view, fails to take proper account of our prior cases that have given that history a much more limited reading than that adopted by the dissent. For example, in *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 434–436, and n. 11 (1971), the Court refused to give controlling weight to the memorandum of Senators Clark and Case which the dissent now finds so persuasive. See *post,* at 239–241. And in quoting a statement from that memorandum that an employer would not be "permitted . . . to prefer Negroes for future vacancies," *post,* at 240, the dissent does not point out that the Court's opinion in *Teamsters* v. *United States,* 431 U. S., at 349–351, implies that that language is limited to the protection of established seniority systems. Here, seniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights. In short, the passages marshaled by the dissent are not so compelling as to merit the whip hand over the obvious equity of permitting employers to ameliorate the effects of past discrimination for which Title VII provides no direct relief.

III

I also think it significant that, while the Court's opinion does not foreclose other forms of affirmative action, the Kaiser

program it approves is a moderate one. The opinion notes that the program does not afford an absolute preference for blacks, and that it ends when the racial composition of Kaiser's craftwork force matches the racial composition of the local population. It thus operates as a temporary tool for remedying past discrimination without attempting to "maintain" a previously achieved balance. See *University of California Regents* v. *Bakke*, 438 U. S. 265, 342 n. 17 (1978) (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Because the duration of the program is finite, it perhaps will end even before the "stage of maturity when action along this line is no longer necessary." *Id.*, at 403 (opinion of BLACKMUN, J.). And if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses.

MR. CHIEF JUSTICE BURGER, dissenting.

The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory "construction," the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It "amends" the statute to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do.

When Congress enacted Title VII after long study and searching debate, it produced a statute of extraordinary clarity, which speaks directly to the issue we consider in this case. In § 703 (d) Congress provided:

> "It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or

> retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." 42 U. S. C. § 2000e–2 (d).

Often we have difficulty interpreting statutes either because of imprecise drafting or because legislative compromises have produced genuine ambiguities. But here there is no lack of clarity, no ambiguity. The quota embodied in the collective-bargaining agreement between Kaiser and the Steelworkers unquestionably discriminates on the basis of race against individual employees seeking admission to on-the-job training programs. And, under the plain language of § 703 (d), that is "an *unlawful* employment practice."

Oddly, the Court seizes upon the very clarity of the statute almost as a justification for evading the unavoidable impact of its language. The Court blandly tells us that Congress could not really have meant what it said, for a "literal construction" would defeat the "purpose" of the statute—at least the congressional "purpose" as five Justices divine it today. But how are judges supposed to ascertain the *purpose* of a statute except through the words Congress used and the legislative history of the statute's evolution? One need not even resort to the legislative history to recognize what is apparent from the face of Title VII—that it is specious to suggest that § 703 (j) contains a negative pregnant that permits employers to do what §§ 703 (a) and (d) unambiguously and unequivocally *forbid* employers from doing. Moreover, as MR. JUSTICE REHNQUIST'S opinion—which I join—conclusively demonstrates, the legislative history makes equally clear that the supporters and opponents of Title VII reached an agreement about the statute's intended effect. That agreement, expressed so clearly in the language of the statute that no one should doubt its meaning, forecloses the reading which the Court gives the statute today.

Arguably, Congress may not have gone far enough in correcting the effects of past discrimination when it enacted Title VII. The gross discrimination against minorities to which the Court adverts—particularly against Negroes in the building trades and craft unions—is one of the dark chapters in the otherwise great history of the American labor movement. And, I do not question the importance of encouraging voluntary compliance with the purposes and policies of Title VII. But that statute was conceived and enacted to make discrimination against *any* individual illegal, and I fail to see how "voluntary compliance" with the no-discrimination principle that is the heart and soul of Title VII as currently written will be achieved by permitting employers to discriminate against some individuals to give preferential treatment to others.

Until today, I had thought the Court was of the unanimous view that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" in Title VII. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). Had Congress intended otherwise, it very easily could have drafted language allowing what the Court permits today. Far from doing so, Congress expressly *prohibited* in §§ 703 (a) and (d) the very discrimination against Brian Weber which the Court today approves. If "affirmative action" programs such as the one presented in this case are to be permitted, it is for Congress, not this Court, to so direct.

It is often observed that hard cases make bad law. I suspect there is some truth to that adage, for the "hard" cases always tempt judges to exceed the limits of their authority, as the Court does today by totally rewriting a crucial part of Title VII to reach a "desirable" result. Cardozo no doubt had this type of case in mind when he wrote:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of

> beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." The Nature of the Judicial Process 141 (1921).

What Cardozo tells us is beware the "good result," achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means. For there is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at "good ends."

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

In a very real sense, the Court's opinion is ahead of its time: it could more appropriately have been handed down five years from now, in 1984, a year coinciding with the title of a book from which the Court's opinion borrows, perhaps subconsciously, at least one idea. Orwell describes in his book a governmental official of Oceania, one of the three great world powers, denouncing the current enemy, Eurasia, to an assembled crowd:

> "It was almost impossible to listen to him without being first convinced and then maddened. . . . The speech had been proceeding for perhaps twenty minutes when a messenger hurried onto the platform and a scrap of paper was slipped into the speaker's hand. He unrolled and read it without pausing in his speech. Nothing altered in his voice or manner, or in the content of what he was saying, but suddenly the names were different. Without words

> said, a wave of understanding rippled through the crowd. Oceania was at war with Eastasia! . . . The banners and posters with which the square was decorated were all wrong! . . .
>
> "[T]he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax." G. Orwell, Nineteen Eighty-Four 181–182 (1949).

Today's decision represents an equally dramatic and equally unremarked switch in this Court's interpretation of Title VII.

The operative sections of Title VII prohibit racial discrimination in employment *simpliciter*. Taken in its normal meaning, and as understood by all Members of Congress who spoke to the issue during the legislative debates, see *infra*, at 231–251, this language prohibits a covered employer from considering race when making an employment decision, whether the race be black or white. Several years ago, however, a United States District Court held that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted." *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 278 (1976). This Court unanimously reversed, concluding from the "uncontradicted legislative history" that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes . . . ." *Id.*, at 280.

We have never wavered in our understanding that Title VII "prohibits *all* racial discrimination in employment, without exception for any group of particular employees." *Id.*, at 283 (emphasis in original). In *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971), our first occasion to interpret Title VII, a unanimous Court observed that "[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed." And in our most

recent discussion of the issue, we uttered words seemingly dispositive of this case: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 579 (1978) (emphasis in original).[1]

Today, however, the Court behaves much like the Orwellian speaker earlier described, as if it had been handed a note indicating that Title VII would lead to a result unacceptable to the Court if interpreted here as it was in our prior decisions. Accordingly, without even a break in syntax, the Court rejects "a literal construction of § 703 (a)" in favor of newly discovered "legislative history," which leads it to a conclusion directly contrary to that compelled by the "uncontradicted legislative history" unearthed in *McDonald* and our other prior decisions. Now we are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race: an employer may, in the Court's words, "trammel the interests of the white employees" in favor of black employees in order to eliminate "racial imbalance." *Ante*, at 208. Our earlier interpretations of Title VII, like the banners and posters decorating the square in Oceania, were all wrong.

As if this were not enough to make a reasonable observer question this Court's adherence to the oft-stated principle that our duty is to construe rather than rewrite legislation, *United States* v. *Rutherford*, 442 U. S. 544, 555 (1979), the Court also seizes upon § 703 (j) of Title VII as an independent, or at least partially independent, basis for its holding. Totally ignoring the wording of that section, which is obviously addressed to those charged with the responsibility of inter-

[1] Our statements in *Griggs* and *Furnco Construction*, patently inconsistent with today's holding, are not even mentioned, much less distinguished, by the Court.

preting the law rather than those who are subject to its proscriptions, and totally ignoring the months of legislative debates preceding the section's introduction and passage, which demonstrate clearly that it was enacted to prevent precisely what occurred in this case, the Court infers from § 703 (j) that "Congress chose not to forbid all voluntary race-conscious affirmative action." *Ante*, at 206.

Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, "uncontradicted" legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions. It may be that one or more of the principal sponsors of Title VII would have preferred to see a provision allowing preferential treatment of minorities written into the bill. Such a provision, however, would have to have been expressly or impliedly excepted from Title VII's explicit prohibition on all racial discrimination in employment. There is no such exception in the Act. And a reading of the legislative debates concerning Title VII, in which proponents and opponents alike uniformly denounced discrimination in favor of, as well as discrimination against, Negroes, demonstrates clearly that any legislator harboring an unspoken desire for such a provision could not possibly have succeeded in enacting it into law.

I

Kaiser opened its Gramercy, La., plant in 1958. Because the Gramercy facility had no apprenticeship or in-plant craft training program, Kaiser hired as craftworkers only persons with prior craft experience. Despite Kaiser's efforts to locate and hire trained black craftsmen, few were available in the Gramercy area, and as a consequence, Kaiser's craft positions were manned almost exclusively by whites. In February 1974, under pressure from the Office of Federal Contract Compliance to increase minority representation in craft positions

at its various plants,[2] and hoping to deter the filing of employment discrimination claims by minorities, Kaiser entered into a collective-bargaining agreement with the United Steelworkers of America (Steelworkers) which created a new on-the-job craft training program at 15 Kaiser facilities, including the Gramercy plant. The agreement required that no less than one minority applicant be admitted to the training program for every nonminority applicant until the percentage of blacks in craft positions equaled the percentage of blacks in the local work force.[3] Eligibility for the craft training pro-

[2] The Office of Federal Contract Compliance (OFCC), subsequently renamed the Office of Federal Contract Compliance Programs (OFCCP), is an arm of the Department of Labor responsible for ensuring compliance by Government contractors with the equal employment opportunity requirements established by Exec. Order No. 11246, 3 CFR 339 (1964–1965 Comp.), as amended by Exec. Order No. 11375, 3 CFR 684 (1966–1970 Comp.), and by Exec. Order No. 12086, 3 CFR 230 (1979).

Executive Order No. 11246, as amended, requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." § 202 (1), 3 CFR 685 (1966–1970 Comp.), note following 42 U. S. C. § 2000e. The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. He, in turn, has delegated most enforcement duties to the OFCC. See 41 CFR § 60–20.1 *et seq.*, § 60–2.24 (1978).

The affirmative action program mandated by 41 CFR § 60–2 (Revised Order No. 4) for nonconstruction contractors requires a "utilization" study to determine minority representation in the work force. Goals for hiring and promotion must be set to overcome any "underutilization" found to exist.

The OFCC employs the "power of the purse" to coerce acceptance of its affirmative action plans. Indeed, in this action, "the district court found that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts." 563 F. 2d 216, 226 (CA5 1977).

[3] The pertinent portions of the collective-bargaining agreement provide: "It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Main-

grams was to be determined on the basis of plant seniority, with black and white applicants to be selected on the basis of their relative seniority within their racial group.

Brian Weber is white. He was hired at Kaiser's Gramercy plant in 1968. In April 1974, Kaiser announced that it was offering a total of nine positions in three on-the-job training programs for skilled craft jobs. Weber applied for all three programs, but was not selected. The successful candidates—five black and four white applicants—were chosen in accord-

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tenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:

"[Gramercy Works listed, among others]

"As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates. . . .

. . . . . .

"The term 'minority' as used herein shall be as defined in EEOC Reporting Requirements." 415 F. Supp. 761, 763 (ED La. 1976).

The "Joint Committee" subsequently entered into a "Memorandum of Understanding" establishing a goal of 39% as the percentage of blacks that must be represented in each "craft family" at Kaiser's Gramercy plant. *Id.*, at 764. The goal of 39% minority representation was based on the percentage of minority workers available in the Gramercy area.

Contrary to the Court's assertion, it is not at all clear that Kaiser's admission quota is a "temporary measure . . . not intended to maintain racial balance." *Ante*, at 208. Dennis E. English, industrial relations superintendent at the Gramercy plant, testified at trial:

"Once the goal is reached of 39 percent, or whatever the figure will be down the road, I think it's subject to change, once the goal is reached in each of the craft families, at that time, we will then revert to a ratio of what that percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage. The idea, again, being to have a minority representation in the plant that is equal to that representation in the community work force population." App. 69.

ance with the 50% minority admission quota mandated under the 1974 collective-bargaining agreement. Two of the successful black applicants had less seniority than Weber.[4] Weber brought the instant class action [5] in the United States District Court for the Eastern District of Louisiana, alleging that use of the 50% minority admission quota to fill vacancies in Kaiser's craft training programs violated Title VII's prohibition on racial discrimination in employment. The District Court and the Court of Appeals for the Fifth Circuit agreed, enjoining further use of race as a criterion in admitting applicants to the craft training programs.[6]

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[4] In addition to the April programs, the company offered three more training programs in 1974 with a total of four positions available. Two white and two black employees were selected for the programs, which were for "Air Conditioning Repairman" (one position), "Carpenter-Painter" (two positions), and "Insulator" (one position). Weber sought to bid for the insulator trainee position, but he was not selected because that job was reserved for the most senior qualified black employee. *Id.*, at 46.

[5] The class was defined to include the following employees:

"All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana, works who are members of the United Steelworkers of America, AFL–CIO Local 5702, who are not members of a minority group, and who have applied for or were eligible to apply for on-the-job training programs since February 1, 1974." 415 F. Supp., at 763.

[6] In upholding the District Court's injunction, the Court of Appeals affirmed the District Court's finding that Kaiser had not been guilty of any past discriminatory hiring or promotion at its Gramercy plant. The court thus concluded that this finding removed the instant action from this Court's line of "remedy" decisions authorizing fictional seniority in order to place proved victims of discrimination in as good a position as they would have enjoyed absent the discriminatory hiring practices. See *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747 (1976). "In the absence of prior discrimination," the Court of Appeals observed, "a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, §§ 703 (a) and (d). Title VII outlaws preferences for any group, minority or majority, if based on race or other impermissible classifications, but it does not outlaw preferences favoring victims of discrimination." 563 F. 2d, at 224 (em-

II

Were Congress to act today specifically to prohibit the type of racial discrimination suffered by Weber, it would be hard pressed to draft language better tailored to the task than that found in § 703 (d) of Title VII:

> "It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." 78 Stat. 256, 42 U. S. C. § 2000e–2 (d).

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phasis in original). Nor was the Court of Appeals moved by the claim that Kaiser's discriminatory admission quota is justified to correct a lack of training of Negroes due to past societal discrimination: "Whatever other effects societal discrimination may have, it has had—by the specific finding of the court below—*no effect* on the seniority of any party here." *Id.*, at 226 (emphasis in original). Finally, the Court of Appeals rejected the argument that Kaiser's admission quota does not violate Title VII because it is sanctioned, indeed compelled, by Exec. Order No. 11246 and regulations issued by the OFCC mandating affirmative action by all Government contractors. See n. 2, *supra*. Citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), the court concluded that "[i]f Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the Executive Order must fall before this direct congressional prohibition [of § 703 (d)]." 563 F. 2d, at 227 (emphasis in original).

Judge Wisdom, in dissent, argued that "[i]f an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an *arguable* violation of Title VII, it should be upheld." *Id.*, at 230. The United States, in its brief before this Court, and MR. JUSTICE BLACKMUN, *ante*, p. 209, largely adopt Judge Wisdom's theory, which apparently rests on the conclusion that an employer is free to correct *arguable* discrimination against his black employees by adopting measures that he *knows* will discriminate against his white employees.

Equally suited to the task would be § 703 (a)(2), which makes it unlawful for an employer to classify his employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, 42 U. S. C. § 2000e–2 (a)(2).[7]

Entirely consistent with these two express prohibitions is the language of § 703 (j) of Title VII, which provides that the Act is not to be interpreted "to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group" to correct a racial imbalance in the employer's work force. 42 U. S. C. § 2000e–2 (j).[8] Seizing on the word "require," the Court

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[7] Section 703 (a)(1) provides the third express prohibition in Title VII of Kaiser's discriminatory admission quota:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 78 Stat. 255, 42 U. S. C. § 2000e–2 (a)(1).

[8] The full text of § 703 (j), 78 Stat. 257, 42 U. S. C. § 2000e–2 (j), provides as follows:

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

infers that Congress must have intended to "permit" this type of racial discrimination. Not only is this reading of § 703 (j) outlandish in the light of the flat prohibitions of §§ 703 (a) and (d), but, as explained in Part III, it is also totally belied by the Act's legislative history.

Quite simply, Kaiser's racially discriminatory admission quota is flatly prohibited by the plain language of Title VII. This normally dispositive fact,[9] however, gives the Court only momentary pause. An "interpretation" of the statute upholding Weber's claim would, according to the Court, " 'bring about an end completely at variance with the purpose of the statute.' " *Ante*, at 202, quoting *United States* v. *Public Utilities Comm'n*, 345 U. S. 295, 315 (1953). To support this conclusion, the Court calls upon the "spirit" of the Act, which it divines from passages in Title VII's legislative history indicating that enactment of the statute was prompted by Congress' desire " 'to open employment opportunities for Negroes in occupations which [had] been traditionally closed to them.' " *Ante*, at 203, quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey).[10] But the legislative history invoked by

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[9] "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

". . . [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source." *Caminetti* v. *United States*, 242 U. S. 470, 490 (1917).

[10] In holding that Title VII cannot be interpreted to prohibit use of Kaiser's racially discriminatory admission quota, the Court reasons that it would be "ironic" if a law inspired by the history of racial discrimination in employment against blacks forbade employers from voluntarily discriminating against whites in favor of blacks. I see no irony in a law that prohibits *all* voluntary racial discrimination, even discrimination directed at whites in favor of blacks. The evil inherent in discrimination against Negroes is that it is based on an immutable characteristic, utterly irrelevant to employment decisions. The characteristic becomes no less

the Court to avoid the plain language of §§ 703 (a) and (d) simply misses the point. To be sure, the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII. But this fact by no means supports the proposition that Congress intended to leave employers free to discriminate against white persons.[11] In most

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immutable and irrelevant, and discrimination based thereon becomes no less evil, simply because the person excluded is a member of one race rather than another. Far from ironic, I find a prohibition on all preferential treatment based on race as elementary and fundamental as the principle that "two wrongs do not make a right."

[11] The only shred of legislative history cited by the Court in support of the proposition that "Congress did not intend wholly to prohibit private and voluntary affirmative action efforts," *ante*, at 203, is the following excerpt from the Judiciary Committee Report accompanying the civil rights bill reported to the House:

"No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*" H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963) (hereinafter H. R. Rep.), quoted *ante*, at 203–204.

The Court seizes on the italicized language to support its conclusion that Congress did not intend to prohibit voluntary imposition of racially discriminatory employment quotas. The Court, however, stops too short in its reading of the House Report. The words immediately following the material excerpted by the Court are as follows:

"It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating *the most serious types of discrimination.* This H. R. 7152, as amended, would achieve in a number of related areas. It would reduce discriminatory obstacles to the exercise of the right to vote and provide means of expediting the vindication of that right. It would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public. It would guarantee that there will be no discrimination upon recipients of Federal financial assistance. It would prohibit discrimination in employment, and

cases, "[l]egislative history . . . is more vague than the statute we are called upon to interpret." *United States* v. *Public Utilities Comm'n, supra,* at 320 (Jackson, J., concurring). Here, however, the legislative history of Title VII is as clear as the language of §§ 703 (a) and (d), and it irrefutably demonstrates that Congress meant precisely what it said in §§ 703 (a) and (d)—that *no* racial discrimination in employment is permissible under Title VII, not even preferential treatment of minorities to correct racial imbalance.

III

In undertaking to review the legislative history of Title VII, I am mindful that the topic hardly makes for light reading,

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provide means to expedite termination of discrimination in public education. It would open additional avenues to deal with redress of denials of equal protection of the laws on account of race, color, religion, or national origin by State or local authorities." H. R. Rep., pt. 1, p. 18 (emphasis added).

When thus read in context, the meaning of the italicized language in the Court's excerpt of the House Report becomes clear. By dealing with "the most serious types of discrimination," such as discrimination in voting, public accommodations, employment, etc., H. R. 7152 would hopefully inspire "voluntary or local resolution of other forms of discrimination," that is, forms other than discrimination in voting, public accommodations, employment, etc.

One can also infer from the House Report that the Judiciary Committee hoped that federal legislation would inspire voluntary elimination of discrimination against minority groups other than those protected under the bill, perhaps the aged and handicapped to name just two. In any event, the House Report does not support the Court's proposition that Congress, by banning racial discrimination in employment, intended to permit racial discrimination in employment.

Thus, examination of the House Judiciary Committee's report reveals that the Court's interpretation of Title VII, far from being compelled by the Act's legislative history, is utterly without support in that legislative history. Indeed, as demonstrated in Part III, *infra,* the Court's interpretation of Title VII is totally refuted by the Act's legislative history.

but I am also fearful that nothing short of a thorough examination of the congressional debates will fully expose the magnitude of the Court's misinterpretation of Congress' intent.

A

Introduced on the floor of the House of Representatives on June 20, 1963, the bill—H. R. 7152—that ultimately became the Civil Rights Act of 1964 contained no compulsory provisions directed at private discrimination in employment. The bill was promptly referred to the Committee on the Judiciary, where it was amended to include Title VII. With two exceptions, the bill reported by the House Judiciary Committee contained §§ 703 (a) and (d) as they were ultimately enacted. Amendments subsequently adopted on the House floor added § 703's prohibition against sex discrimination and § 703 (d)'s coverage of "on-the-job training."

After noting that "[t]he purpose of [Title VII] is to eliminate . . . discrimination in employment based on race, color, religion, or national origin," the Judiciary Committee's Report simply paraphrased the provisions of Title VII without elaboration. H. R. Rep., pt. 1, p. 26. In a separate Minority Report, however, opponents of the measure on the Committee advanced a line of attack which was reiterated throughout the debates in both the House and Senate and which ultimately led to passage of § 703 (j). Noting that the word "discrimination" was nowhere defined in H. R. 7152, the Minority Report charged that the absence from Title VII of any reference to "racial imbalance" was a "public relations" ruse and that "the administration intends to rely upon its own construction of 'discrimination' as including the lack of racial balance . . . ." H. R. Rep., pt. 1, pp. 67–68. To demonstrate how the bill would operate in practice, the Minority Report posited a number of hypothetical employment situations, concluding in each example that the employer "*may be forced to hire according to race,* to 'racially balance' those who work for

him *in every job classification* or be in violation of Federal law." *Id.*, at 69 (emphasis in original).[12]

When H. R. 7152 reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, Chairman of the House Judiciary Committee and the Congressman responsible for introducing the legislation. A portion of that speech responded to criticism "seriously mis-

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[12] One example has particular relevance to the instant litigation:

"Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority but of the stipulated race. And if the union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must, then, go into the street and recruit members of the stipulated race in sufficient number to comply with Federal orders, else his local could be held in violation of Federal law." H. R. Rep., pt. 1, p. 71.

From this and other examples, the Minority Report concluded: "That this is, in fact, a not too subtle system of racism-in-reverse cannot be successfully denied." *Id.*, at 73.

Obviously responding to the Minority Report's charge that federal agencies, particularly the Equal Employment Opportunity Commission would equate "discrimination" with "racial imbalance," the Republican sponsors of the bill on the Judiciary Committee stated in a separate Report:

"It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. . . . Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification." *Id.*, pt. 2, p. 29.

The Republican supporters of the bill concluded their remarks on Title VII by declaring that "[a]ll vestiges of inequality based solely on race must be removed . . . ." *Id.*, at 30.

represent[ing] what the bill would do and grossly distort[ing] its effects":

> "[T]he charge has been made that the Equal Employment Opportunity Commission to be established by title VII of the bill would have the power to prevent a business from employing and promoting the people it wished, and that a 'Federal inspector' could then order the hiring and promotion only of employees of certain races or religious groups. This description of the bill is entirely wrong. . . .
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> . . . . . .
>
> "Even [a] court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end of discrimination. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous.
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> . . . . . .
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> ". . . The Bill would do no more than prevent . . . employers from discriminating against *or in favor* of workers because of their race, religion, or national origin.
>
> "It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped." 110 Cong. Rec. 1518 (1964) (emphasis added).

Representative Celler's construction of Title VII was repeated by several other supporters during the House debate.[13]

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[13] Representative Lindsay had this to say:

"This legislation . . . does not, as has been suggested heretofore both on and off the floor, force acceptance of people in . . . jobs . . . because they are Negro. It does not impose quotas or any special privileges of seniority

Thus, the battle lines were drawn early in the legislative struggle over Title VII, with opponents of the measure charging that agencies of the Federal Government such as the Equal Employment Opportunity Commission (EEOC), by interpreting the word "discrimination" to mean the existence of "racial imbalance," would "require" employers to grant preferential treatment to minorities, and supporters responding that the EEOC would be granted no such power and that, indeed, Title VII prohibits discrimination "in favor of workers because of their race." Supporters of H. R. 7152 in the House ultimately prevailed by a vote of 290 to 130,[14] and the measure was sent to the Senate to begin what became the longest debate in that body's history.

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or acceptance. There is nothing whatever in this bill about racial balance as appears so frequently in the minority report of the Committee.

"What the bill does do is prohibit discrimination because of race . . . ." 110 Cong. Rec. 1540 (1964).

Representative Minish added: "Under title VII, employment will be on the basis of merit, not of race. This means that no quota system will be set up, no one will be forced to hire incompetent help because of race or religion, and no one will be given a vested right to demand employment for a certain job." *Id.*, at 1600. Representative Goodell, answering the charge that Title VII would be interpreted "to requir[e] a racial balance," *id.*, at 2557, responded: "There is nothing here as a matter of legislative history that would require racial balancing. . . . We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved. It is a matter of an individual's rights having been violated, charges having been brought, investigation carried out and conciliation having been attempted and then proof in court that there was discrimination and denial of rights on the basis of race or color." *Id.*, at 2558. After H. R. 7152 had been passed and sent to the Senate, Republican supporters of the bill in the House prepared an interpretative memorandum making clear that "title VII *does not permit* the ordering of racial quotas in businesses or unions and does not permit interferences with seniority rights of employees or union members." *Id.*, at 6566 (emphasis added).

[14] Eleven Members did not vote.

B

The Senate debate was broken into three phases: the debate on sending the bill to Committee, the general debate on the bill prior to invocation of cloture, and the debate following cloture.

1

When debate on the motion to refer the bill to Committee opened, opponents of Title VII in the Senate immediately echoed the fears expressed by their counterparts in the House, as is demonstrated by the following colloquy between Senators Hill and Ervin:

> "Mr. ERVIN. I invite attention to . . . Section [703 (a)] . . . .
>
> . . . . .
>
> "I ask the Senator from Alabama if the Commission could not tell an employer that he had too few employees, that he had limited his employment, and enter an order, under [Section 703 (a)], requiring him to hire more persons, not because the employer thought he needed more persons, but because the Commission wanted to compel him to employ persons of a particular race.
>
> "Mr. HILL. The Senator is correct. That power is written into the bill. The employer could be forced to hire additional persons . . . ." 110 Cong. Rec. 4764 (1964).[15]

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[15] Continuing with their exchange, Senators Hill and Ervin broached the subject of racial balance:

"Mr. ERVIN. So if the Commissioner . . . should be joined by another member of the Commission in the finding that the employer had too high a percentage, in the Commission's judgment, of persons of the Caucasian race working in his business, they could make the employer either hire, in addition to his present employees, an extra number of Negro employees, or compel him to fire employees of the Caucasian race in order to make a place for Negro employees?

"Mr. HILL. The Senator is correct, although the employer might not

Senator Humphrey, perhaps the primary moving force behind H. R. 7152 in the Senate, was the first to state the proponents' understanding of Title VII. Responding to a political advertisement charging that federal agencies were at liberty to interpret the word "discrimination" in Title VII to require racial balance, Senator Humphrey stated: "[T]he meaning of racial or religious discrimination is perfectly clear. . . . [I]t means a distinction in treatment given to different individuals because of their different race, religion, or national origin." *Id.*, at 5423.[16] Stressing that Title VII "does not limit the employer's freedom to hire, fire, promote or demote for any reasons—or no reasons—so long as his action is not

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need the additional employees, and although they might bring his business into bankruptcy." 110 Cong. Rec. 4764 (1964).

This view was reiterated by Senator Robertson:

"It is contemplated by this title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons. Thus, if there were 10,000 colored persons in a city and 15,000 whites, an employer with 25 employees would, in order to overcome racial imbalance, be required to have 10 colored personnel and 15 white. And if by chance that employer had 20 colored employees, he would have to fire 10 of them in order to rectify the situation. Of course, this works the other way around where whites would be fired." *Id.*, at 5092.

Senator Humphrey interrupted Senator Robertson's discussion, responding: "The bill does not require that at all. If it did, I would vote against it. . . . There is no percentage quota." *Ibid.*

[16] This view was reiterated two days later in the "Bipartisan Civil Rights Newsletter" distributed to the Senate on March 19 by supporters of H. R. 7152:

"3. Defining discrimination: Critics of the civil rights bill have charged that the word 'discrimination' is left undefined in the bill and therefore the door is open for interpretation of this term according to 'whim or caprice.' . . .

. . . . . .

"There is no sound basis for uncertainty about the meaning of discrimination in the context of the civil rights bill. It means a distinction in treatment given to different individuals because of their different race, religion, or national origin." *Id.*, at 7477.

based on race," Senator Humphrey further stated that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." *Ibid.*[17]

After 17 days of debate, the Senate voted to take up the bill directly, without referring it to a committee. *Id.*, at 6455. Consequently, there is no Committee Report in the Senate.

2

Formal debate on the merits of H. R. 7152 began on March 30, 1964. Supporters of the bill in the Senate had made elaborate preparations for this second round. Senator Humphrey, the majority whip, and Senator Kuchel, the minority whip, were selected as the bipartisan floor managers on the entire civil rights bill. Responsibility for explaining and defending each important title of the bill was placed on bipartisan "captains." Senators Clark and Case were selected as the bipartisan captains responsible for Title VII. Vaas, Title VII: Legislative History, 7 B. C. Ind. & Com. L. Rev. 431, 444–445 (1966) (hereinafter Title VII: Legislative History).

In the opening speech of the formal Senate debate on the bill, Senator Humphrey addressed the main concern of Title

[17] Earlier in the debate, Senator Humphrey had introduced a newspaper article quoting the answers of a Justice Department "expert" to the "10 most commonly expressed objections to [Title VII]." Insofar as is pertinent here, the article stated:

"Objection: The law would empower Federal 'inspectors' to require employers to hire by race. White people would be fired to make room for Negroes. Seniority rights would be destroyed. . . .

"Reply: The bill requires no such thing. The five-member Equal Employment Opportunity Commission that would be created would have no powers to order anything. . . .

". . . The bill would not authorize anyone to order hiring or firing to achieve racial or religious balance. An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of his race or religion. Similarly, the law will have no effect on union seniority rights." *Id.*, at 5094.

VII's opponents, advising that not only does Title VII not require use of racial quotas, *it does not permit* their use. "The truth," stated the floor leader of the bill, "is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII." 110 Cong. Rec. 6549 (1964). Senator Humphrey continued:

> "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.
>
> "That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, *the very opposite is true. Title VII prohibits discrimination.* In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion." *Ibid.* (emphasis added).

At the close of his speech, Senator Humphrey returned briefly to the subject of employment quotas: "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race shall not be a basis for making personnel decisions." *Id.*, at 6553.

Senator Kuchel delivered the second major speech in support of H. R. 7152. In addressing the concerns of the opposition, he observed that "[n]othing could be further from the truth" than the charge that "Federal inspectors" would be empowered under Title VII to dictate racial balance and preferential advancement of minorities. *Id.*, at 6563. Senator Kuchel emphasized that seniority rights would in no way be affected by Title VII: "Employers and labor organizations could not discriminate *in favor of or against* a person because of his race, his religion, or his national origin. In such matters . . . the bill now before us . . . is color-blind." *Id.*, at 6564 (emphasis added).

A few days later the Senate's attention focused exclusively on Title VII, as Senators Clark and Case rose to discuss the title of H. R. 7152 on which they shared floor "captain" responsibilities. In an interpretative memorandum submitted jointly to the Senate, Senators Clark and Case took pains to refute the opposition's charge that Title VII would result in preferential treatment of minorities. Their words were clear and unequivocal:

> "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual." *Id.*, at 7213.[18]

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[18] In obvious reference to the charge that the word "discrimination" in Title VII would be interpreted by federal agencies to mean the absence of racial balance, the interpretative memorandum stated:

"[Section 703] prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment *or favor*, and those distinctions or differences in treatment *or favor* which are prohibited by [Section 703] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin." *Id.*, at 7213 (emphasis added).

Earlier in his speech, Senator Clark introduced a memorandum prepared at his request by the Justice Department with the purpose of responding to criticisms of Title VII leveled by opponents of the measure, particularly Senator Hill. With regard to racial balance, the Justice Department stated:

"Finally, it has been asserted that title VII would impose a requirement for 'racial balance.' This is incorrect. There is no provision . . . in title VII . . . that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. . . . No employer is required to maintain any ratio of Negroes to whites . . . . On the contrary,

Of particular relevance to the instant litigation were their observations regarding seniority rights. As if directing their comments at Brian Weber, the Senators said:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—*or indeed permitted*—to fire whites in order to hire Negroes, *or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*" *Ibid.* (emphasis added).[19]

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any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all." *Id.*, at 7207.

[19] A Justice Department memorandum earlier introduced by Senator Clark, see n. 18, *supra*, expressed the same view regarding Title VII's impact on seniority rights of employees:

"Title VII would have no effect on seniority rights existing at the time it takes effect. . . . This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. . . . [A]ssuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race." 110 Cong. Rec. 7207 (1964).

The interpretation of Title VII contained in the memoranda introduced by Senator Clark totally refutes the Court's implied suggestion that Title VII would prohibit an employer from discriminating on the basis of race in order to *maintain* a racial balance in his work force, but would permit him to do so in order to *achieve* racial balance. See *ante*, at 208, and n. 7.

The maintain-achieve distinction is analytically indefensible in any event.

Thus, with virtual clairvoyance the Senate's leading supporters of Title VII anticipated precisely the circumstances of this case and advised their colleagues that the type of minority preference employed by Kaiser would violate Title VII's ban on racial discrimination. To further accentuate the point, Senator Clark introduced another memorandum dealing with common criticisms of the bill, including the charge that racial quotas would be imposed under Title VII. The answer was simple and to the point: "Quotas are themselves discriminatory." *Id.*, at 7218.

Despite these clear statements from the bill's leading and most knowledgeable proponents, the fears of the opponents

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Apparently, the Court is saying that an employer is free to *achieve* a racially balanced work force by discriminating against whites, but that once he has reached his goal, he is no longer free to discriminate in order to maintain that racial balance. In other words, once Kaiser reaches its goal of 39% minority representation in craft positions at the Gramercy plant, it can no longer consider race in admitting employees into its on-the-job training programs, even if the programs become as "all-white" as they were in April 1974.

Obviously, the Court is driven to this illogical position by the glaring statement, quoted in text, of Senators Clark and Case that "any deliberate attempt to *maintain* a racial balance . . . would involve a violation of title VII because *maintaining* such a balance would require an employer to hire or to refuse to hire on the basis of race." 110 Cong. Rec. 7213 (1964) (emphasis added). Achieving a certain racial balance, however, no less than maintaining such a balance, would require an employer to hire or to refuse to hire on the basis of race. Further, the Court's own conclusion that Title VII's legislative history, coupled with the wording of § 703 (j), evinces a congressional intent to leave employers free to employ "private, voluntary, race-conscious affirmative action plans," *ante*, at 208, is inconsistent with its maintain-achieve distinction. If Congress' primary purpose in enacting Title VII was to open employment opportunities previously closed to Negroes, it would seem to make little difference whether the employer opening those opportunities was achieving or maintaining a certain racial balance in his work force. Likewise, if § 703 (j) evinces Congress' intent to permit imposition of race-conscious affirmative action plans, it would seem to make little difference whether the plan was adopted to achieve or maintain the desired racial balance.

were not put to rest. Senator Robertson reiterated the view that "discrimination" could be interpreted by a federal "bureaucrat" to require hiring quotas. *Id.*, at 7418–7420.[20] Senators Smathers and Sparkman, while conceding that Title VII does not in so many words require the use of hiring quotas, repeated the opposition's view that employers would be coerced to grant preferential hiring treatment to minorities by agencies of the Federal Government.[21] Senator Williams was quick to respond:

> "Those opposed to H. R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. . . . Some people charge that H. R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense." *Id.*, at 8921.

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[20] Senator Robertson's observations prompted Senator Humphrey to make the following offer: "If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color . . . I will start eating the pages one after another, because it is not in there." 110 Cong. Rec. 7420 (1964).

[21] Referring to the EEOC, Senator Smathers argued that Title VII "would make possible the creation of a Federal bureaucracy which would, in the final analysis, cause a man to hire someone whom he did not want to hire, not on the basis of ability, but on the basis of religion, color, or creed . . . ." *Id.*, at 8500. Senator Sparkman's comments were to the same effect. See n. 23, *infra*. Several other opponents of Title VII expressed similar views. See 110 Cong. Rec. 9034–9035 (1964) (remarks of Sens. Stennis and Tower); *id.*, at 9943–9944 (remarks of Sens. Long and Talmadge); *id.*, at 10513 (remarks of Sen. Robertson).

Senator Williams concluded his remarks by noting that Title VII's only purpose is "the elimination of racial and religious discrimination in employment." *Ibid.*[22] On May 25, Senator Humphrey again took the floor to defend the bill against "the well-financed drive by certain opponents to confuse and mislead the American people." *Id.*, at 11846. Turning once again to the issue of preferential treatment, Senator Humphrey remained faithful to the view that he had repeatedly expressed:

> "The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, *the title would prohibit preferential treatment for any particular group,* and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices." *Id.*, at 11848 (emphasis added).

While the debate in the Senate raged, a bipartisan coalition under the leadership of Senators Dirksen, Mansfield, Humphrey, and Kuchel was working with House leaders and representatives of the Johnson administration on a number of amendments to H. R. 7152 designed to enhance its prospects of passage. The so-called "Dirksen-Mansfield" amendment was introduced on May 26 by Senator Dirksen as a substitute for the entire House-passed bill. The substitute bill, which ultimately became law, left unchanged the basic prohibitory language of §§ 703 (a) and (d), as well as the remedial provisions in § 706 (g). It added, however, several provisions defining and clarifying the scope of Title VII's substantive pro-

[22] Several other proponents of H. R. 7152 commented briefly on Title VII, observing that it did not authorize the imposition of quotas to correct racial imbalance. See *id.*, at 9113 (remarks of Sen. Keating); *id.*, at 9881–9882 (remarks of Sen. Allott); *id.*, at 10520 (remarks of Sen. Carlson); *id.*, at 11768 (remarks of Sen. McGovern).

hibitions. One of those clarifying amendments, § 703 (j), was specifically directed at the opposition's concerns regarding racial balancing and preferential treatment of minorities, providing in pertinent part: "Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of" a racial imbalance in the employer's work force. 42 U. S. C. § 2000e–2 (j); quoted in full in n. 8, *supra*.

The Court draws from the language of § 703 (j) primary support for its conclusion that Title VII's blanket prohibition on racial discrimination in employment does not prohibit preferential treatment of blacks to correct racial imbalance. Alleging that opponents of Title VII had argued (1) that the Act would be interpreted to require employers with racially imbalanced work forces to grant preferential treatment to minorities and (2) that "employers with racially imbalanced work forces would grant preferential treatment to racial minorities, even if not required to do so by the Act," *ante*, at 205, the Court concludes that § 703 (j) is responsive only to the opponents' first objection and that Congress therefore must have intended to permit voluntary, private discrimination against whites in order to correct racial imbalance.

Contrary to the Court's analysis, the language of § 703 (j) is precisely tailored to the objection voiced time and again by Title VII's opponents. Not once during the 83 days of debate in the Senate did a speaker, proponent or opponent, suggest that the bill would allow employers *voluntarily* to prefer racial minorities over white persons.[23] In light of Title VII's flat

[23] The Court cites the remarks of Senator Sparkman in support of its suggestion that opponents had argued that employers would take it upon themselves to balance their work forces by granting preferential treatment to racial minorities. In fact, Senator Sparkman's comments accurately reflected the opposition's "party line." He argued that while the language of Title VII does not expressly require imposition of racial quotas (no one, of course, had ever argued to the contrary), the law would be applied by

prohibition on discrimination "against any individual . . . because of such individual's race," § 703 (a), 42 U. S. C. § 2000e–2 (a), such a contention would have been, in any event, too preposterous to warrant response. Indeed, speakers on both sides of the issue, as the legislative history makes clear, recognized that Title VII would tolerate no *voluntary* racial preference, whether in favor of blacks or whites. The complaint consistently voiced by the opponents was that Title VII, particularly the word "discrimination," would be *interpreted* by federal agencies such as the EEOC to *require* the

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federal agencies in such a way that "some kind of quota system will be used." *Id.*, at 8619. Senator Sparkman's view is reflected in the following exchange with Senator Stennis:

"Mr. SPARKMAN. At any rate, when the Government agent came to interview an employer who had 100 persons in his employ, the first question would be, 'How many Negroes are you employing?' Suppose the population of that area was 20 percent Negro. Immediately the agent would say, 'You should have at least 20 Negroes in your employ, and they should be distributed among your supervisory personnel and in all the other categories'; and the agent would *insist* that that be done immediately.

. . . . .

"Mr. STENNIS. . . .

"The Senator from Alabama has made very clear his point about employment on the quota basis. Would not the same basis be applied to promotions?

"Mr. SPARKMAN. Certainly it would. As I have said, when the Federal agents came to check on the situation in a small business which had 100 employees, and when the agents said to the employer, 'You must hire 20 Negroes, and some of them must be employed in supervisory capacities,' and so forth, and so on, the agent would also say, 'And you must promote the Negroes, too, in order to distribute them evenly among the various ranks of your employees.'" *Id.*, at 8618 (emphasis added).

Later in his remarks, Senator Sparkman stated: "Certainly the suggestion will be made to a small business that may have a small Government contract . . . that if it does not carry out the suggestion that has been made to the company by an inspector, its Government contract will not be renewed." *Ibid.* Except for the size of the business, Senator Sparkman has seen his prophecy fulfilled in this case.

correction of racial imbalance through the granting of preferential treatment to minorities. Verbal assurances that Title VII would not require—indeed, would not permit—preferential treatment of blacks having failed, supporters of H. R. 7152 responded by proposing an amendment carefully worded to meet, and put to rest, the opposition's charge. Indeed, unlike §§ 703 (a) and (d), which are by their terms directed at entities—*e. g.*, employers, labor unions—whose actions are restricted by Title VII's prohibitions, the language of § 703 (j) is specifically directed at entities—federal agencies and courts—charged with the responsibility of interpreting Title VII's provisions.[24]

In light of the background and purpose of § 703 (j), the irony of invoking the section to justify the result in this case is obvious. The Court's frequent references to the "voluntary" nature of Kaiser's racially discriminatory admission quota bear no relationship to the facts of this case. Kaiser and the Steelworkers acted under pressure from an agency of the Federal Government, the Office of Federal Contract Compliance, which found that minorities were being "underutilized" at Kaiser's plants. See n. 2, *supra*. That is, Kaiser's work force was racially imbalanced. Bowing to that pressure, Kaiser instituted an admissions quota preferring blacks over whites, thus confirming that the fears of Title VII's opponents were well founded. Today, § 703 (j), adopted to allay those fears, is invoked by the Court to uphold imposition of a racial quota under the very circumstances that the section was intended to prevent.[25]

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[24] Compare § 703 (a), 42 U. S. C. § 2000e–2 (a) ("It shall be an unlawful employment practice for an employer . . ."), with § 703 (j), 42 U. S. C. § 2000e–2 (j) ("Nothing contained in this subchapter shall be interpreted . . .").

[25] In support of its reading of § 703 (j), the Court argues that "a prohibition against all voluntary, race-conscious, affirmative action efforts would disserve" the important policy, expressed in the House Report on H. R. 7152, that Title VII leave "management prerogatives, and union

Section 703 (j) apparently calmed the fears of most of the opponents; after its introduction, complaints concerning racial balance and preferential treatment died down considerably.[26] Proponents of the bill, however, continued to reassure the opposition that its concerns were unfounded. In a lengthy defense of the entire civil rights bill, Senator Muskie emphasized that the opposition's "torrent of words . . . cannot obscure this basic, simple truth: Every American citizen has the right to equal treatment—not favored treatment, not complete

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freedoms . . . undisturbed to the greatest extent possible." H. R. Rep., pt. 2, p. 29, quoted *ante*, at 206. The Court thus concludes that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action." *Ante*, at 207.

The sentences in the House Report immediately following the statement quoted by the Court, however, belie the Court's conclusion:

"Internal affairs of employers and labor organizations must not be interfered with *except to the limited extent that correction is required in discrimination practices*. Its primary task is to make certain that the channels of employment are open to persons *regardless of their race* and that jobs in companies or membership in unions are strictly filled on the basis of qualification." H. R. Rep., pt. 2, p. 29 (emphasis added).

Thus, the House Report invoked by the Court is perfectly consistent with the countless observations elsewhere in Title VII's voluminous legislative history that employers are free to make employment decisions without governmental interference, so long as those decisions are made *without regard to race*. The whole purpose of Title VII was to deprive employers of their "traditional business freedom" to discriminate on the basis of race. In this case, the "channels of employment" at Kaiser were hardly "open" to Brian Weber.

[26] Some of the opponents still were not satisfied. For example, Senator Ervin of North Carolina continued to maintain that Title VII "would give the Federal Government the power to go into any business or industry in the United States . . . and tell the operator of that business whom he had to hire." 110 Cong. Rec. 13077 (1964). Senators Russell and Byrd remained of the view that pressures exerted by federal agencies would compel employers "to give priority definitely and almost completely, in most instances, to the members of the minority group." *Id.*, at 13150 (remarks of Sen. Russell).

individual equality—just equal treatment." 110 Cong. Rec. 12614 (1964). With particular reference to Title VII, Senator Muskie noted that the measure "seeks to afford to all Americans equal opportunity in employment without discrimination. Not equal pay. Not 'racial balance.' Only equal opportunity." *Id.*, at 12617.[27]

Senator Saltonstall, Chairman of the Republican Conference of Senators participating in the drafting of the Dirksen-Mansfield amendment, spoke at length on the substitute bill. He advised the Senate that the Dirksen-Mansfield substitute, which included § 703 (j), "provides no preferential treatment for any group of citizens. In fact, *it specifically prohibits such treatment.*" 110 Cong. Rec. 12691 (1964) (emphasis added).[28]

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[27] Senator Muskie also addressed the charge that federal agencies would equate "discrimination," as that word is used in Title VII, with "racial balance":

"[S]ome of the opposition to this title has been based upon its alleged vagueness [and] its failure to define just what is meant by discrimination . . . . I submit that, on either count, the opposition is not well taken. Discrimination in this bill means just what it means anywhere: a distinction in treatment given to different individuals because of their race . . . [a]nd, as a practical matter, we all know what constitutes racial discrimination." *Id.*, at 12617.

Senator Muskie then reviewed the various provisions of § 703, concluding that they "provide a clear and definitive indication of the type of practice which this title seeks to eliminate. Any serious doubts concerning [Title VII's] application would, it seems to me, stem at least partially from the predisposition of the person expressing such doubt." 110 Cong. Rec. 12618 (1964).

[28] The Court states that congressional comments regarding § 703 (j) "were all to the effect that employers would not be *required* to institute preferential quotas to avoid Title VII liability." *Ante*, at 207 n. 7 (emphasis in original). Senator Saltonstall's statement that Title VII of the Dirksen-Mansfield substitute, which contained § 703 (j), "specifically prohibits" preferential treatment for any racial group disproves the Court's observation. Further, in a major statement explaining the purpose of the Dirksen-Mansfield substitute amendments, Senator Humphrey said of

On June 9, Senator Ervin offered an amendment that would entirely delete Title VII from the bill. In answer to Senator Ervin's contention that Title VII "would make the members of a particular race special favorites of the laws," *id.*, at 13079, Senator Clark retorted:

> "The bill does not make anyone higher than anyone else. It establishes no quotas. It leaves an employer free to select whomever he wishes to employ. . . .
>
> "All this is subject to one qualification, and that qualification, is to state: 'In your activity as an employer . . . you must not discriminate because of the color of a man's skin. . . .'
>
> "That is all this provision does. . . .
>
> "It merely says, 'When you deal in interstate commerce, you must not discriminate on the basis of race . . . .'" *Id.*, at 13080.

The Ervin amendment was defeated, and the Senate turned its attention to an amendment proposed by Senator Cotton to limit application of Title VII to employers of at least 100 employees. During the course of the Senate's deliberations on the amendment, Senator Cotton had a revealing discussion with Senator Curtis, also an opponent of Title VII. Both men expressed dismay that Title VII would prohibit preferential hiring of "members of a minority race in order to enhance their opportunity":

> "Mr. CURTIS. Is it not the opinion of the Senator that any individuals who provide jobs for a class of people who have perhaps not had sufficient opportunity for jobs should be commended rather than outlawed?

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§ 703 (j): "This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning." 110 Cong. Rec. 12723 (1964). What Senator Humphrey had "maintained all along about the bill's intent and meaning," was that it neither required *nor permitted* imposition of preferential quotas to eliminate racial imbalances.

"Mr. COTTON. Indeed it is." *Id.*, at 13086.[29]

Thus, in the only exchange on the Senate floor raising the possibility that an employer might wish to reserve jobs for minorities in order to assist them in overcoming their employment disadvantage, both speakers concluded that Title VII prohibits such, in the words of the Court, "voluntary, private, race-conscious efforts to abolish traditional patterns of racial

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[29] The complete exchange between Senators Cotton and Curtis, insofar as is pertinent here, is as follows:

"Mr. COTTON. . . .

. . . . . .

"I would assume that anyone who will administer the laws in future years will not discriminate between the races. If I were a Negro, and by dint of education, training, and hard work I had amassed enough property as a Negro so that I had a business of my own—and there are many of them in this country—and I felt that, having made a success of it myself, I wanted to help people of my own race to step up as I had stepped up, I think I should have the right to do so. I think I should have the right to employ Negroes in my own establishment and put out a helping hand to them if I so desired. I do not believe that anyone in Washington should be permitted to come in and say, 'You cannot employ all Negroes. You must have some Poles. You must have some Yankees.' . . .

. . . . . .

"Mr. CURTIS. . . .

"The Senator made reference to the fact that a member of a minority race might become an employer and should have a right to employ members of his race in order to give them opportunity. Would not the same thing follow, that a member of a majority race might wish to employ almost entirely, or entirely, members of a minority race in order to enhance their opportunity? And is it not true that under title VII as written, that would constitute discrimination?

"Mr. COTTON. It certainly would, if someone complained about it and felt that he had been deprived of a job, and that it had been given to a member of a minority race because of his race and not because of some other reason." *Id.*, at 13086.

This colloquy refutes the Court's statement that "[t]here was no suggestion after the adoption of § 703 (j) that wholly voluntary, race-conscious, affirmative action efforts would in themselves constitute a violation of Title VII." *Ante*, at 207 n. 7.

segregation and hierarchy." *Ante,* at 204. Immediately after this discussion, both Senator Dirksen and Senator Humphrey took the floor in defense of the 25-employee limit contained in the Dirksen-Mansfield substitute bill, and neither Senator disputed the conclusions of Senators Cotton and Curtis. The Cotton amendment was defeated.

3

On June 10, the Senate, for the second time in its history, imposed cloture on its Members. The limited debate that followed centered on proposed amendments to the Dirksen-Mansfield substitute. Of some 24 proposed amendments, only 5 were adopted.

As the civil rights bill approached its final vote, several supporters rose to urge its passage. Senator Muskie adverted briefly to the issue of preferential treatment: "It has been said that the bill discriminates in favor of the Negro at the expense of the rest of us. It seeks to do nothing more than to lift the Negro from the status of inequality to one of *equality* of treatment." 110 Cong. Rec. 14328 (1964) (emphasis added). Senator Moss, in a speech delivered on the day that the civil rights bill was finally passed, had this to say about quotas:

> "The bill does not accord to any citizen advantage or preference—it does not fix quotas of employment or school population—it does not force personal association. What it does is to prohibit public officials and those who invite the public generally to patronize their businesses or to apply for employment, to utilize the offensive, humiliating, and cruel practice of discrimination on the basis of race. In short, the bill does not accord special consideration; it establishes *equality.*" *Id.,* at 14484 (emphasis added).

Later that day, June 19, the issue was put to a vote, and the Dirksen-Mansfield substitute bill was passed.

C

The Act's return engagement in the House was brief. The House Committee on Rules reported the Senate version without amendments on June 30, 1964. By a vote of 289 to 126, the House adopted H. Res. 789, thus agreeing to the Senate's amendments of H. R. 7152.[30] Later that same day, July 2, the President signed the bill and the Civil Rights Act of 1964 became law.

IV

Reading the language of Title VII, as the Court purports to do, "against the background of [its] legislative history . . . and the historical context from which the Act arose," *ante*, at 201, one is led inescapably to the conclusion that Congress fully understood what it was saying and meant precisely what it said. Opponents of the civil rights bill did not argue that employers would be permitted under Title VII voluntarily to grant preferential treatment to minorities to correct racial imbalance. The plain language of the statute too clearly prohibited such racial discrimination to admit of any doubt. They argued, tirelessly, that Title VII would be interpreted by federal agencies and their agents to require unwilling employers to racially balance their work forces by granting preferential treatment to minorities. Supporters of H. R. 7152

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[30] Only three Congressmen spoke to the issue of racial quotas during the House's debate on the Senate amendments. Representative Lindsay stated: "[W]e wish to emphasize also that this bill does not require quotas, racial balance, or any of the other things that the opponents have been saying about it." 110 Cong. Rec. 15876 (1964). Representative McCulloch echoed this understanding, remarking that "[t]he bill does not permit the Federal Government to require an employer or union to hire or accept for membership a quota of persons from any particular minority group." *Id.*, at 15893. The remarks of Representative MacGregor, quoted by the Court, *ante*, at 207–208, n. 7, are singularly unhelpful. He merely noted that by adding § 703 (j) to Title VII of the House bill, "[t]he Senate . . . spelled out [the House's] intentions more specifically." 110 Cong. Rec. 15893 (1964).

responded, equally tirelessly, that the Act would not be so interpreted because not only does it not require preferential treatment of minorities, it also does not *permit* preferential treatment of any race for any reason. It cannot be doubted that the proponents of Title VII understood the meaning of their words, for "[s]eldom has similar legislation been debated with greater consciousness of the need for 'legislative history,' or with greater care in the making thereof, to guide the courts in interpreting and applying the law." Title VII: Legislative History, at 444.

To put an end to the dispute, supporters of the civil rights bill drafted and introduced § 703 (j). Specifically addressed to the opposition's charge, § 703 (j) simply enjoins federal agencies and courts from interpreting Title VII to require an employer to prefer certain racial groups to correct imbalances in his work force. The section says nothing about voluntary preferential treatment of minorities because such racial discrimination is plainly proscribed by §§ 703 (a) and (d). Indeed, had Congress intended to except voluntary, race-conscious preferential treatment from the blanket prohibition of racial discrimination in §§ 703 (a) and (d), it surely could have drafted language better suited to the task than § 703 (j). It knew how. Section 703 (i) provides:

> "Nothing contained in [Title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." 78 Stat. 257, 42 U. S. C. § 2000e–2 (i).

V

Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress. To divine that intent, we traditionally look first to the

words of the statute and, if they are unclear, then to the statute's legislative history. Finding the desired result hopelessly foreclosed by these conventional sources, the Court turns to a third source—the "spirit" of the Act. But close examination of what the Court proffers as the spirit of the Act reveals it as the spirit animating the present majority, not the 88th Congress. For if the spirit of the Act eludes the cold words of the statute itself, it rings out with unmistakable clarity in the words of the elected representatives who made the Act law. It is *equality*. Senator Dirksen, I think, captured that spirit in a speech delivered on the floor of the Senate just moments before the bill was passed:

> ". . . [T]oday we come to grips finally with a bill that advances the enjoyment of living; but, more than that, it advances the equality of opportunity.
>
> "I do not emphasize the word 'equality' standing by itself. It means equality of opportunity in the field of education. It means equality of opportunity in the field of employment. It means equality of opportunity in the field of participation in the affairs of government . . . .
>
> "That is it.
>
> "Equality of opportunity, if we are going to talk about conscience, is the mass conscience of mankind that speaks in every generation, and it will continue to speak long after we are dead and gone." 110 Cong. Rec. 14510 (1964).

There is perhaps no device more destructive to the notion of equality than the *numerus clausus*—the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. In passing Title VII, Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative. With today's holding, the Court introduces into

Title VII a tolerance for the very evil that the law was intended to eradicate, without offering even a clue as to what the limits on that tolerance may be. We are told simply that Kaiser's racially discriminatory admission quota "falls on the permissible side of the line." *Ante,* at 208. By going not merely *beyond,* but directly *against* Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind.

EDMONDS *v.* COMPAGNIE GENERALE TRANSATLANTIQUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78–479. Argued March 19, 1979—Decided June 27, 1979

Petitioner longshoreman, while employed by a stevedoring concern that respondent shipowner had engaged to unload cargo from its vessel, was injured in the course of that work, and received benefits for the injury from his employer under the Longshoremen's and Harbor Workers' Compensation Act (Act). Petitioner also brought this negligence action against respondent in Federal District Court, wherein the jury determined that petitioner was responsible for 10% of the total negligence resulting in his injury, that the stevedore's fault, through a coemployee's negligence, contributed 70%, and that respondent was accountable for 20%. Following established maritime law, the District Court reduced the award to petitioner by the 10% attributed to his own negligence but refused further to reduce the award against respondent in proportion to the fault of the stevedore-employer. The Court of Appeals reversed, holding that the 1972 Amendments to the Act had altered the traditional admiralty rule by making the shipowner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault.

Held:

1. Under the 1972 Amendments to the Act, Congress did not intend to change the judicially created admiralty rule that the shipowner can be made to pay all the damages not due to the plaintiff's own negligence by imposing a proportionate-fault rule. Pp. 263–271.

(a) There is no conflict between the provisions of the Amendments that (1) in the event of injury to a person covered by the Act "caused by the negligence of a vessel," such person may bring an action against the vessel as a third party, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void, and (2) if such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was "caused by the negligence of persons engaged in providing stevedoring services to the vessel." The first provision addresses the recurring situation, such as in this case, where the party injured by the vessel's negligence is a longshoreman employed by a stevedoring concern, and does not purport to modify the traditional

admiralty rule. The second provision applies only to the less familiar arrangement where the ship is its own stevedore, and is to be construed as permitting a third-party suit against the shipowner-stevedore when negligence in its nonstevedoring capacity contributes to the injury. Pp. 263–266.

(b) The legislative history does not support the Court of Appeals' interpretation of the statute, which modifies the longshoreman's pre-existing rights against the negligent vessel. Pp. 266–268.

(c) While some inequity appears inevitable in the present statutory scheme, and while the Court of Appeals' proportionate-fault rule may remove some of the inequities, nevertheless it creates others and appears to shift some burdens to the longshoreman. There is nothing to indicate and it will not be presumed that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect. Pp. 268–271.

2. Nor will this Court change the traditional rule so as to make the vessel liable only for the damages in proportion to its own negligence. By now changing what Congress understood to be the law and did not itself wish to modify, this Court might knock out of kilter the delicate balance effected by Congress concerning the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. This Court should stay its hand in these circumstances. Pp. 271–273.

577 F. 2d 1153, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 273. POWELL, J., took no part in the consideration or decision of the case.

Calvin W. Breit argued the cause for petitioner. With him on the briefs was *C. Arthur Rutter, Jr.*

Charles F. Tucker argued the cause for respondent. With him on the brief was *John B. King, Jr.**

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*Briefs of *amici curiae* urging reversal were filed by *David R. Owen* for Liberty Mutual Insurance Co.; and by *Thomas D. Wilcox* for the National Association of Stevedores.

Briefs of *amici curiae* urging affirmance were filed by *Randall C. Cole-*

MR. JUSTICE WHITE delivered the opinion of the Court.

On March 3, 1974, the S.S. *Atlantic Cognac*, a containership owned by respondent, arrived at the Portsmouth Marine Terminal, Va. Petitioner, a longshoreman, was then employed by the Nacirema Operating Co., a stevedoring concern that the shipowner had engaged to unload cargo from the vessel. The longshoreman was injured in the course of that work, and he received benefits for that injury from his employer under the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.* In addition, the longshoreman brought this negligence action against the shipowner in Federal District Court.

A jury determined that the longshoreman had suffered total damages of $100,000, that he was responsible for 10% of the total negligence resulting in his injury, that the stevedore's fault, through a co-employee's negligence, contributed 70%, and that the shipowner was accountable for 20%.[1] Following an established principle of maritime law, the District Court reduced the award to the longshoreman by the 10% attributed to his own negligence.[2] But also in accordance with maritime law, and the common law as well, the court refused further to reduce the award against the shipowner in proportion to the fault of the employer.

The United States Court of Appeals for the Fourth Circuit, with two judges dissenting, reversed en banc, holding that the

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man for American Export Lines, Inc., et al.; and by *Graydon S. Staring* for the Pacific Merchant Shipping Association.

Paul S. Edelman, Arthur Abarbanel, and *Bernard M. Goldstein* filed a brief for the Association of Trial Lawyers of America as *amicus curiae.*

[1] The District Court set aside a jury verdict for the longshoreman in an earlier trial because of errors in the jury instructions.

[2] The plaintiff's negligence is not an absolute bar to recovery under maritime law, which accepts the concept of comparative negligence of plaintiff and defendant. *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 408–409 (1953); *The Max Morris,* 137 U. S. 1, 15 (1890); see n. 23, *infra.*

1972 Amendments to the Act, 86 Stat. 1251, had altered the traditional admiralty rule by making the shipowner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. 577 F. 2d 1153, 1155–1156 (1978).[3] Other Courts of Appeals have reached the contrary conclusion.[4] We granted certiorari to resolve this conflict, 439 U. S. 952 (1978), and, once again,[5] we have before us a question of the meaning of the 1972 Amendments.

I

Admiralty law is judge-made law to a great extent, *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409 (1975); *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 20 (1963), and a longshoreman's maritime tort action against a shipowner was recognized long before the 1972 Amendments, see *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 413–414 (1953), as it has been since.[6] As that law had evolved by 1972, a

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[3] A panel of the Court of Appeals had earlier reached a similar conclusion. 558 F. 2d 186, 193–194 (1977); see n. 26, *infra*.

[4] *Zapico* v. *Bucyrus-Erie Co.*, 579 F. 2d 714, 725 (CA2 1978); *Samuels* v. *Empresa Lineas Maritimas Argentinas*, 573 F. 2d 884, 887–889 (CA5 1978), cert. pending, No. 78–795; *Dodge* v. *Mitsui Shintaku Ginko K. K. Tokyo*, 528 F. 2d 669, 671–673 (CA9 1975), cert. denied, 425 U. S. 944 (1976); *Shellman* v. *United States Lines, Inc.*, 528 F. 2d 675, 679–680 (CA9 1975), cert. denied, 425 U. S. 936 (1976). See also *Cella* v. *Partenreederei MS Ravenna*, 529 F. 2d 15, 20 (CA1 1975) (indicating agreement with *Dodge*, *supra*), cert. denied, 425 U. S. 975 (1976); *Marant* v. *Farrell Lines, Inc.*, 550 F. 2d 142, 145–147 (CA3 1977) (discussing but reserving the issue); *id.*, at 147–152 (Van Dusen, J., concurring) (expressing concern over validity of apportionment of damages).

[5] See also *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249 (1977); *Director, Workers' Compensation Programs* v. *Rasmussen*, 440 U. S. 29 (1979); *P. C. Pfeiffer Co.* v. *Diverson Ford*, No. 78–425 (to be reargued October Term 1979).

[6] Title 33 U. S. C. § 933 (a), which was unchanged in 1972, states that when a longshoreman "determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive . . . compensation or to recover damages against such

longshoreman's award in a suit against a negligent shipowner would be reduced by that portion of the damages assignable to the longshoreman's own negligence; but, as a matter of maritime tort law, the shipowner would be responsible to the longshoreman in full for the remainder, even if the stevedore's negligence contributed to the injuries.[7] This latter rule is in accord with the common law, which allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident.[8]

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third person." Section 905 (b), which was added in 1972, states that the longshoreman "may bring an action against [the shipowner] as a third party in accordance with the provisions of section 933 . . . ."

[7] See, *e. g.*, *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106, 108, 113 (1974) (longshoreman could have recovered entire damages from shipowner responsible for 50% of the total fault); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 283 (1952) (shipowner responsible for 25% of negligence required to pay 100% of damages, and contribution unavailable from negligent shoreside contractor, an employer under the Act). See also *The Atlas*, 93 U. S. 302 (1876); *The Juniata*, 93 U. S. 337 (1876). We stated the common-law rule in *The Atlas* and adopted it as part of admiralty jurisprudence: "Nothing is more clear than the right of a plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." 93 U. S., at 315.

[8] Restatement (Second) of Torts §§ 433A, 875, and 879 (1965 and 1979); T. Cooley, Law of Torts 142–144 (1879); W. Prosser, Law of Torts § 47, pp. 297–299, and § 52, pp. 314–315 (4th ed. 1971); cf. *Washington & Georgetown R. Co.* v. *Hickey*, 166 U. S. 521, 527 (1897). A tortfeasor is not relieved of liability for the entire harm he caused just because another's negligence was also a factor in effecting the injury. "Nor are the damages against him diminished." Restatement, *supra*, § 879, Comment a. Likewise, under traditional tort law, a plaintiff obtaining a judgment against more than one concurrent tortfeasor may satisfy it against any one of them. *Id.*, § 886. A concurrent tortfeasor generally may seek contribution from another, *id.*, § 886A, but he is not relieved from liability for the

The problem we face today, as was true of similar problems the Court has dealt with in the past, is complicated by the overlap of loss-allocating mechanisms that are guided by somewhat inconsistent principles. The liability of the ship to the longshoreman is determined by a combination of judge-made and statutory law and, in the present context, depends on a showing of negligence or some other culpability. The longshoreman-victim, however, and his stevedore-employer—also a tortfeasor in this case—are participants in a workers' compensation scheme that affords benefits to the longshoreman regardless of the employer's fault and provides that the stevedore's only liability for the longshoreman's injury is to the longshoreman in the amount specified in the statute.[9] 33 U. S. C. § 905. We have more than once attempted to reconcile these systems.

We first held that the shipowner could not circumvent the exclusive-remedy provision by obtaining contribution from the concurrent tortfeasor employer. *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952); *Pope & Talbot, Inc.* v. *Hawn, supra;* see *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106, 111–113 (1974). As a matter of maritime law, we also held that a longshoreman working on a vessel was entitled to the warranty of seaworthiness, *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94 (1946), which amounted to liability without fault for most onboard injuries.[10] However, we went on to hold, as a matter of con-

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entire damages even when the nondefendant tortfeasor is immune from liability. *Id.*, § 880. These principles, of course, are inapplicable where the injury is divisible and the causation of each part can be separately assigned to each tortfeasor. *Id.*, §§ 433A (1) and 881.

[9] Generally, workers' compensation benefits are not intended to compensate for an employee's entire losses. 1 A. Larson, Law of Workmen's Compensation § 2.50 (1978). The 1972 Amendments to the Act, however, make a determined effort to narrow the gap between the harm suffered and the benefits payable.

[10] See, *e. g.*, *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 549–550 (1960).

tract law, that the shipowner could obtain from the stevedore an express or implied warranty of workmanlike service that might result in indemnification of the shipowner for its liability to the longshoreman. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956).

Against this background, Congress acted in 1972, among other things,[11] to eliminate the shipowner's liability to the longshoreman for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoreman—in other words, to overrule *Sieracki* and *Ryan*. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 260–261, and n. 18 (1977); *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, *supra*, at 113 n. 6. Though admitting that nothing in either the statute or its history expressly indicates that Congress intended to modify as well the existing rules governing the longshoreman's maritime negligence suit against the shipowner by diminishing damages recoverable from the latter on the basis of the proportionate fault of the nonparty stevedore, 577 F. 2d, at 1155, and n. 2, the en banc Court of Appeals found that such a result was necessary to reconcile two sentences added in 1972 as part of 33 U. S. C. § 905 (b). The two sentences state:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall

[11] The Amendments also increased compensation benefits, expanded the Act's geographic coverage, and instituted a new means of adjudicating compensation cases. Robertson, Jurisdiction, Shipowner Negligence and Stevedore Immunities under the 1972 Amendments to the Longshoremen's Act, 28 Mercer L. Rev. 515, 516 (1977).

> be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." 33 U. S. C. § 905 (b).

The Court of Appeals described the perceived conflict in this fashion:

> "The first sentence says that if the injury is caused by the negligence of a vessel the longshoreman may recover, but the second sentence says he may not recover anything of the ship if his injury was caused by the negligence of a person providing stevedoring services. The sentences are irreconcilable if read to mean that any negligence on the part of the ship will warrant recovery while any negligence on the part of the stevedore will defeat it. They may be harmonized only if read in apportioned terms." 577 F. 2d, at 1155.

For a number of reasons, we are unpersuaded that Congress intended to upset a "long-established and familiar princip[e]" of maritime law by imposing a proportionate-fault rule. Cf. *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 783 (1952).

A

In the first place, the conflict seen by the Court of Appeals is largely one of its own creation. Both sides admit that each sentence may be read so as not to conflict with the other. The first sentence addresses the recurring situation, reflected by the facts in this case, where the party injured by the negligence of the vessel is a longshoreman employed by a stevedoring concern. In these circumstances, the longshoreman may sue the vessel as a third party, but his employer, the stevedore, is not to be liable directly or indirectly for any damages that may be recovered. This first sentence overrules *Ryan* and prevents the vessel from recouping from the

stevedore any of the damages that the longshoreman may recover from the vessel. But the sentence neither expressly nor implicitly purports to overrule or modify the traditional rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore, whose limited liability is fixed by statute, is partly to blame.

The second sentence of the paragraph is expressly addressed to the different and less familiar arrangement where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company—in short, to the situation where the ship is its own stevedore.[12] In this situation, the second sentence places some limitations on suits against the vessel for injuries caused during its stevedoring operations.[13] Whatever these limitations may be, there is no conflict between the two sentences, and one arises only if the second sentence is read, as the Court of Appeals read it, as applying to all injured longshoremen, whether employed by the ship or by an independent stevedore. Nothing in the legislative history advises this construction of the sentence,[14]

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[12] The first proposals in the legislative movement that produced the 1972 Amendments would have made all shipowners statutory employers, not just those also acting as stevedores, and thus cut off any tort action by the longshoreman. S. 525, 92d Cong., 1st Sess., § 1 (1971), Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (Committee Print compiled for the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare), pp. 393–394 (1972). Congress ultimately decided to preserve the longshoremen's tort action against shipowners acting as shipowners.

[13] In *Jackson* v. *Lykes Bros. S. S. Co.*, 386 U. S. 731 (1967), and *Reed* v. *The Yaka*, 373 U. S. 410 (1963), we upheld a longshoreman's negligence or unseaworthiness action against the shipowner-stevedore.

[14] See S. Rep. No. 92–1125, p. 11 (1972) (hereinafter S. Rep.) ("Accordingly, the bill provides in the case of a longshoreman who is *employed directly* by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services") (emphasis supplied). The House Report, H. R.

and we see no reason to depart from the language of the statute in this respect.

Respondent insists that, even though the two sentences may deal with different business arrangements, problems still arise. If under the first sentence a third-party suit against the vessel is authorized when *any part* of the negligence causing the injury is that of the vessel, it is argued that suit against the vessel under the second sentence should be barred when *any part* of the negligence causing the injury is that of a co-worker also providing stevedoring services to the vessel. Under this interpretation, the employee of the independent stevedore could recover from the ship where the stevedore was responsible for 99% of the negligence, though a ship's employee performing stevedoring services could not hold the vessel liable if his co-worker's negligence was the slightest cause of the injury.[15] This is said to be preposterous and contrary to the legislative intent to treat the vessel that provides its own stevedoring services just like other shipowners when and if it negligently causes injury in its capacity as a shipowner and just like other stevedores when it negligently injures in the course of providing its own loading or unloading services.[16]

Aside from the fact that the problem suggested would arise only in the application of the second sentence, which is not involved in this case, the argument that the words "caused by the negligence of" in the two sentences must be given the same meaning and that they cannot have the meaning ascribed to them by petitioner's construction of the first sentence, logically leads to the conclusion that the injured

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Rep. No. 92–1441 (1972), is identical to the Senate Report in all respects material to this case. Accordingly, further references will be only to the Senate Report.

[15] In many cases, of course, the shipowner whose act or omission contributed only a very small percentage of the total negligence will avoid liability on the ground of lack of causation.

[16] S. Rep. 11–12.

longshoreman should *never* be able to bring suit against the vessel unless it is the sole cause of the injury. This is a doubly absurd conclusion. It is supported by no one, and to avoid it, it is necessary only to construe the second sentence to permit a third-party suit against the vessel providing its own loading and unloading services when negligence in its nonstevedoring capacity contributes to the injury. The second sentence means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself.

This leaves the question of the measure of recovery against a shipowner, whether or not it is doing its own stevedoring, when as shipowner it is only partially responsible for the negligence, but we are quite unable to distill from the face of the obviously awkward wording of the two sentences any indication that Congress intended to modify the pre-existing rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship.

B

The legislative history strongly counsels against the Court of Appeals' interpretation of the statute, which modifies the longshoreman's pre-existing rights against the negligent vessel. The reports and debates leading up to the 1972 Amendments contain not a word of this concept.[17] This silence is most eloquent, for such reticence while contemplating an

[17] In the Senate hearings, a plaintiff's lawyer mentioned diminution of damages as a possible solution so long as the shipowner's liability for unseaworthiness was retained. The only committee member present rejected this proposal, and Congress apparently never gave it serious consideration. See Hearings on S. 2318, S. 525, and S. 1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 354–355 (1972).

important and controversial change in existing law is unlikely.[18] Moreover, the general statements appearing in the legislative history concerning § 905 (b) are inconsistent with what respondent argues was in the back of the legislators' minds about this specific issue. The Committees repeatedly refer to the refusal to limit the shipowner's liability for negligence,[19] which they felt left the vessel in the same position as a land-based third party whose negligence injures an employee.[20] Because an employee generally may recover in full from a third-party concurrent tortfeasor,[21] these statements are hardly indicative of an intent to modify the law in the respect found by the Court of Appeals. At the very least, one would expect some hint of a purpose to work such a change, but there was none.

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[18] *Laborers' International Union, Local No. 1057* v. *NLRB*, 186 U. S. App. D. C. 13, 20, 567 F. 2d 1006, 1013 (1977).

The debate over § 905 (b) involved the removal of the shipowner's liability for unseaworthiness. That occurred as a concomitant of ending liability under the stevedore's warranty of workmanlike service, which was a *quid pro quo* for increasing the compensation benefits. See S. Rep. 9–10. Some Congressmen objected to removing the vessel's liability for unseaworthiness because that would deny millions of dollars of relief for longshoremen's injuries. 118 Cong. Rec. 36382–36384 (1972) (Reps. Eckhardt, Dent, and Ashley). Indeed, the concern shared by some Congressmen over any modification of third-party actions "had political ramifications which . . . resulted in forestalling any improvements in the . . . Act for over twelve years." S. Rep. 9. Those Congressmen likely would have assailed the diminution of the longshoreman's recovery in proportion to the stevedore's fault if they had any inkling that the Amendments did that.

[19] *Id.*, at 2, 5, 10.

[20] *Id.*, at 8 ("where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in nonmaritime pursuits are liable for damages when, through their fault, a worker is injured"); accord, *id.*, at 10 and 11.

[21] See n. 8, *supra;* 2A Larson, *supra* n. 9, § 75.22, at 14–263; Soule, Toward an Equitable and Rational Allocation of Employee Injury Losses in Cases with Third Party Liability, 1979 Ins. Counsel J. 201, 202–208.

The shipowner denies that the legislative history is so one-sided, relying upon statements that vessels "will not be chargeable with the negligence of the stevedore or [the] employees of the stevedore." S. Rep. 11; see 577 F. 2d, at 1156 n. 2. But in context these declarations deal only with removal of the shipowner's liability under the warranty of seaworthiness for acts of the stevedore [22]—even nonnegligent ones.[23]

C

Finally, we note that the proportionate-fault rule adopted by the Court of Appeals itself produces consequences that we doubt Congress intended. It may remove some inequities, but it creates others and appears to shift some burdens to the longshoreman.

As we have said, § 905 permits the injured longshoreman to sue the vessel and exempts the employer from any liability to the vessel for any damages that may be recovered. Congress clearly contemplated that the employee be free to sue the third-party vessel, to prove negligence and causation on the vessel's part, and to have the total damages set by the court or jury without regard to the benefits he has received or to which he may be entitled under the Act. Furthermore,

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[22] S. Rep. 9–11.

[23] *E. g., Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U. S. 315 (1964).

The shipowner also relies upon the Reports' reference to "comparative negligence," S. Rep. 12, but in context it is obvious that Congress alluded only, and not erroneously, see Prosser, Comparative Negligence, 51 Mich. L. Rev. 465 n. 2 (1953), to the comparative negligence of the plaintiff longshoreman and the defendant shipowner—a concept that, unlike the proposal before us today, was well established in admiralty. See S. Rep. 12; 33 U. S. C. § 905 (a); n. 2, *supra*. It would be particularly curious for Congress to refer expressly to the established principle of comparative negligence, yet say not a word about adopting a new rule limiting the liability of the shipowner on the basis of the nonparty employer's negligence.

under the traditional rule, the employee may recover from the ship the entire amount of the damages so determined. If he recovers less than the statutory benefits, his employer is still liable for the statutory amount.

Under this arrangement, it is true that the ship will be liable for all of the damages found by the judge or jury; yet its negligence may have been only a minor cause of the injury. The stevedore-employer may have been predominantly responsible; yet its liability is limited by the Act, and if it has lien rights on the longshoreman's recovery it may be out-of-pocket even less.

Under the Court of Appeals' proportionate-fault rule, however, there will be many circumstances where the longshoreman will not be able to recover in any way the full amount of the damages determined in his suit against the vessel. If, for example, his damages are at least twice the benefits paid or payable under the Act and the ship is less than 50% at fault, the total of his statutory benefits plus the reduced recovery from the ship will not equal his total damages. More generally, it would appear that if the stevedore's proportionate fault is more than the proportion of compensation to actual damages, the longshoreman will always fall short of recovering the amount that the factfinder has determined is necessary to remedy his total injury, even though the diminution is due not to his fault, but to that of his employer.[24]

But the impact of the proportionate-fault rule on the longshoreman does not stop there. Under § 933 (b), an administrative order for benefits operates as an assignment to the stevedore-employer of the longshoreman's rights against the third party unless the longshoreman sues within six months. And a corresponding judicially created lien in the employer's

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[24] See *Zapico* v. *Bucyrus-Erie Co.*, 579 F. 2d, at 725 ("one is still left to wonder why the longshoreman injured by the negligence of a third party should recover less when his employer has also been negligent than when the employer has been without fault").

favor operates where the longshoreman himself sues.[25] In the past, this lien has been for the benefits paid up to the amount of the recovery.[26] And under § 933 (c), which Congress left intact in 1972, where the stevedore-employer sues the vessel as statutory assignee it may retain from any recovery an amount equal in general to the expenses of the suit, the costs of medical services and supplies it provided the employee, all compensation benefits paid, the present value of benefits to be paid, plus one-fifth of whatever might remain. Under the Court of Appeals' proportionate-fault system, the longshoreman would get very little, if any, of the diminished recovery obtained by his employer. Indeed, unless the vessel's proportionate fault exceeded the ratio of compensation benefits to total damages, the longshoreman would receive nothing from the third-party action, and the negligent stevedore might recoup all the compensation benefits it had paid.

Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect.[27] Further, the 1972 Amendments make quite clear that "the employer shall not be liable to the vessel for such damages *directly or indirectly*," 33 U. S. C. § 905 (b) (emphasis supplied),[28] and that with the disappearance of the ship's contribution and indemnity right against the stevedore the latter

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[25] See *The Etna*, 138 F. 2d 37 (CA3 1943).

[26] The original Fourth Circuit panel opinion would have made the shipowner liable for an amount equal not just to his proportionate fault, but also to the employer's lien. 558 F. 2d, at 194. The en banc court refused to make the vessel liable for the additional amount of the lien and declined to rule on any alteration of the lien since the employer was not party to the suit. 577 F. 2d, at 1156.

[27] Cf. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S., at 279.

[28] "It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort."

should no longer have to appear routinely in suits between longshoreman and shipowner.[29] Consequently, as we have done before, we must reject a "theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial Act . . . ." *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S., at 278–279.

II

Of course, our conclusion that Congress did not intend to change the judicially created rule that the shipowner can be made to pay all the damages not due to the plaintiff's own negligence does not decide whether we are free to and should change that role so as to make the vessel liable only for the damages in proportion to its own negligence. Indeed, some *amici* in support of respondent share the view that Congress did not change the rule but argue that this Court should do so. We disagree.

Though we recently acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault, see *United States* v. *Reliable Transfer Co.*, 421 U. S. 397 (1975),[30] we

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S. Rep. 11; see *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S., at 412 ("reduction of [the shipowner's] liability at the expense of [the employer] would be the substantial equivalent of contribution"); *Dodge* v. *Mitsui Shintaku Ginko K. K. Tokyo*, 528 F. 2d, at 673; Steinberg, The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Negligence Actions by Longshoremen against Shipowners—A Proposed Solution, 37 Ohio St. L. J. 767, 792–793 (1976).

[29] See S. Rep. 9 ("much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs" of stevedores in third-party actions).

[30] As noted in n. 8, *supra*, the general rule is that a person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if other factors concurred in causing the injury. Normally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor. If both are already before the court—for example, when the

are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change.[31] "One of the most controversial and difficult issues

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plaintiff himself is the concurrent tortfeasor or when the two tortfeasors are suing each other as in a collision case like *Reliable Transfer*—a separate contribution action is unnecessary, and damages are simply allocated accordingly. But the stevedore is not a party and cannot be made a party here, so the *Reliable Transfer* contribution shortcut is inapplicable. Contribution remedies the unjust enrichment of the concurrent tortfeasor, see Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 136 (1932), and while it may sometimes limit the ultimate loss of the tortfeasor chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched. See also H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 525 (tent. ed. 1958). Our prior cases recognize that. Even before *Reliable Transfer*, we apportioned damages between vessels that collided and sued one another. *Reliable Transfer* merely changed the apportionment from equal division to division on the basis of relative fault. But we did not upset the rule that the plaintiff may recover from *one* of the colliding vessels the damage concurrently caused by the negligence of both. Compare *Reliable Transfer Co.* (apportionment of damages on basis of relative fault between plaintiff and defendant who concurrently caused grounding), and *The Schooner Catharine* v. *Dickinson*, 17 How. 170 (1855) (equal apportionment of damages between libelant and respondent vessels where both at fault in collision), with *The Atlas*, 93 U. S. 302 (1876) (in suit by insurer of cargo against one of two ships whose concurrent fault caused collision, the insurer is entitled to recover in full, despite the rule of equal apportionment, because the insurer is not a wrongdoer), and *The Juniata*, 93 U. S. 337, 340 (1876) (same; if respondent vessel has any rights against nonparty vessel, they "must be settled in another proceeding").

[31] Of course, our decision does not necessarily have any effect on situations where the Act provides the workers' compensation scheme but the third-party action is not governed by principles of maritime law. Cf. *Dawson* v. *Contractors Transp. Corp.*, 151 U. S. App. D. C. 401, 467 F. 2d 727 (1972) (private employees in the District of Columbia). See also *infra*, at 273.

which [Congress was] required to resolve . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations." S. Rep. 8. By now changing what we have already established that Congress understood to be the law,[32] and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S., at 112; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S., at 285–286. Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned. Indeed, Congress might have intended to adopt the existing maritime rule even for third-party actions under the Act that are not within the admiralty jurisdiction, though we need not and do not reach that issue today.

Accordingly, we reverse the judgment below and remand for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, dissenting.

The jury in this case found that the shipowner, the stevedore, and the longshoreman were each partially responsible

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[32] Respondent seeks support for its position in the results of "a meeting attended by representatives of labor and industry, Committee members and Committee staff." Brief for Respondent 16. Respondent asserts that the participants at this meeting arrived at a compromise whereby the courts were to fashion the rules to be applied in concurrent-fault situations. No official record of this meeting exists, and subsequent legislative history does not so much as hint at such a compromise. We are not told

for the latter's (petitioner Stanley Edmonds) injury. A member of the ship's crew instructed Edmonds to remove a jack from the rear wheel of a large cargo container. As Edmonds went behind the container to remove the jack, another longshoreman backed a truck into the container, causing it to roll backwards and pin Edmonds against the bulkhead. The jury concluded that the shipowner, as the employer of the crewman, was 20% responsible for the accident; the stevedore, as the employer of the longshoreman driving the truck, was 70% responsible; and Edmonds himself was 10% responsible.

The Court holds that the shipowner, who was 20% negligent, must pay 90% of Edmonds' damages. Edmonds, because of his comparative negligence, must absorb 10% of the damages himself. But the stevedore, who, the jury determined, was 70% at fault, will recoup its statutory compensation payments out of the damages payable to Edmonds, and thus will go scot-free.[1]

The Court does not, and indeed could not, defend this result on grounds of reason or fairness. Today's ruling means that concurrently negligent stevedores will be insulated from the obligation to pay statutory workmen's compensation benefits, and thus will have inadequate incentives to provide a safe working environment for their employees. It also means that shipowners in effect will be held vicariously liable for the negligence of stevedores, and will have to pay damages far out of proportion to their degree of fault. Nor does the Court suggest that its holding is compelled by the language or legis-

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that the Senators and Representatives who voted for the Amendments when they reached the floor knew of the compromise, and we can only presume that they acted with the existing state of the law, not the probability of future judicial change, in mind.

[1] As of December 18, 1978, the stevedore's insurance company had paid Edmonds a total of $49,152 in statutory benefits. Brief for Liberty Mutual Insurance Co. as *Amicus Curiae* 2. Under the judicially created lien sanctioned by the Court's opinion, *ante*, at 269–270, the stevedore's insurer will recover this entire sum out of the $90,000 damages awarded to Edmonds.

lative history of § 5 (b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U. S. C. § 905 (b). The Court appears to advance two justifications for its decision: first, that principles of comparative negligence did not apply under the traditional law of admiralty, and Congress intended to preclude judicial modification of that law when it passed the 1972 Amendments to the LHWCA; and second, that a rule of comparative negligence would be unfair to injured longshoremen. Since I find both purported justifications wholly inadequate to support the Court's decision, I respectfully dissent.

I

The Court begins with the proposition that, under the law maritime as it existed in 1972, the shipowner could not reduce its liability because of the comparative negligence of the stevedore: I am not entirely convinced. None of the decisions cited by the Court, *ante*, at 260 n. 7, stands for this proposition; the cases relied upon all concern the conceptually distinct problem—to which the Court has given varying answers—of whether there is a right of contribution among joint tortfeasors.[2] I am willing to assume, however, for purposes of argument, that the Court has correctly stated the "traditional" admiralty rule.

The Court next states that Congress itself did not impose a rule of comparative negligence when it adopted § 905 (b) in 1972. Again, I am not altogether sure. As Chief Judge Haynsworth demonstrated in his opinion for the en banc court

[2] Technically, there is no issue of "joint and several" liability here, for the stevedore has statutory immunity from tort liability. 33 U. S. C. § 905 (a). Nor are the policies behind the common-law rule of joint and several liability applicable. The common-law rule serves largely to protect plaintiffs from defendants who are unable to pay judgments entered against them. The LHWCA, however, provides safeguards to ensure the payment of compensation benefits. 33 U. S. C. § 932. There is little need, therefore, to make the shipowner liable for full damages to protect the longshoreman from impecunious stevedores.

below, there is some tension between the first and second sentences of § 905 (b).[3] These sentences are most easily reconciled if one assumes that Congress was thinking in terms of comparative negligence. The Court points out that there are other, less plausible, ways of reconciling the two sentences. Although I feel there is room for debate on this question, I am again willing to assume, for purposes of argument, that Congress did not impose a rule of comparative negligence in third-party suits under the LHWCA.

I cannot agree, however, with the Court's third proposition: that Congress intended to *prohibit* this Court from fashioning a rule of comparative negligence in suits for damages by a longshoreman against the shipowner. It is well established that courts exercising jurisdiction in maritime affairs have broad powers of interstitial rulemaking. As the Court stated in *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409 (1975), "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.' *Fitzgerald*

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[3] The first sentence reads: "In the event of injury to a person covered under this chapter *caused by the negligence* of a vessel, then such person . . . may bring an action against such vessel as a third party . . . ." The second sentence reads: "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was *caused by the negligence* of persons engaged in providing stevedoring services to the vessel." (Emphasis added.) If the phrase "caused by the negligence" in both sentences is given the same meaning, and interpreted to mean "caused by any negligence whatsoever," then an employee of an independent stevedoring company could recover full damages under the first sentence if the shipowner was 1% negligent and the stevedore 99% negligent. A longshoreman hired directly by the shipowner, however, would be denied any recovery at all under the second sentence if persons involved in doing stevedoring work committed as little as 1% of the negligence, even if the shipowner was otherwise 99% negligent. If the statutory phrase "caused by the negligence" is interpreted to import the notion of comparative negligence, this anomaly does not arise.

v. *United States Lines Co.*, 374 U. S. 16, 20." I find nothing in the language or legislative history of § 905 (b) that indicates Congress intended to reverse this presumption with respect to third-party actions under the LHWCA.

The Court suggests that Congress, in enacting § 905 (b), "aligned the rights and liabilities of stevedores, shipowners, and longshoremen" on the specific assumption that the shipowner would not be allowed to reduce its liability because of the stevedore's comparative negligence. *Ante*, at 272. The legislative history belies this notion. Congress had two narrow objectives in mind in enacting § 905 (b) in 1972: to overcome this Court's decision in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), and its decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U. S. 124 (1956). See S. Rep. No. 92–1125, pp. 8–11 (1972). These decisions had created a form of circuitous liability whereby the longshoreman, under *Seas Shipping*, sued the shipowner under a theory of unseaworthiness; the shipowner, under *Ryan Stevedoring*, obtained full indemnity from the stevedore; and the stevedore ended up paying actual damages rather than statutory compensation. Congress overruled the strict-liability theory of *Seas Shipping* to ensure that "[t]he vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." S. Rep. No. 92–1125, *supra*, at 11. It eliminated the *Ryan Stevedoring* action for indemnification because if "the vessel's liability is to be based on its own negligence, and the vessel will no longer be liable under the unseaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore . . . ." S. Rep. No. 92–1125, *supra*, at 11. These statements of legislative purpose are as consistent, or more consistent, with a system of comparative negligence, than with a congressional assumption that the shipowner would be fully liable for the concurrent negligence of the stevedore.

The legislative history indicates that, if anything, Congress intended to preserve the role of the federal courts in filling in the contours of § 905 (b). The House and Senate Reports state that the liability of a shipowner in an action brought by a longshoreman should be analogous to that which "would render a land-based third party in non-maritime pursuits liable under similar circumstances." S. Rep. No. 92–1125, *supra*, at 11. The Report emphasizes, however, that this does not mean state tort law is to govern third-party negligence suits against the vessel.

> "[T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable." *Id.*, at 12.

In other words, Congress specifically reaffirmed the admiralty law tradition in the 1972 Amendments, and intended that this Court would continue to resolve "legal questions which may arise in actions brought under these provisions" in accordance with that tradition.

In short, in this case, as in *Reliable Transfer*, 421 U. S., at 409, "[n]o statutory or judicial precept precludes a change in the rule [that the shipowner is fully liable for the concurrent negligence of the stevedore], and indeed a proportional fault rule would simply bring recovery [as between the steve-

dore and shipowner] into line with the rule of admiralty law long since established [as between the longshoreman and the shipowner]."

II

I am also convinced that no injustice to injured longshoremen would result from a rule of comparative negligence. A rule of comparative negligence in no case would reduce the longshoreman's total award below his statutory workmen's compensation benefits.[4] The rule of comparative negligence would affect only the relative proportion of statutory benefits and damages in the longshoreman's total compensation package. In the present case, for example, a rule of comparative negligence would mean the longshoreman would receive 20% damages and 80% statutory benefits, as opposed to 90% damages and 10% statutory benefits.

At first blush, it might appear that there is something unfair about reducing the total potential award of the longshoreman in this manner. But when the different purposes of the statutory compensation scheme and the third-party action for negligence are considered, it can be seen that this result is fully consistent with the policies of the statute. The LHWCA statutory compensation scheme, like other workmen's compensation plans, is based on a compromise. The longshoreman accepts less than full damages for work-related injuries. In exchange, he is guaranteed that these statutory benefits will be paid for every work-related injury without regard to fault. The third-party tort action, in contrast, embodies an element of risk. The longshoreman faces the prospect of an increased award, but also the possibility of receiving nothing if the shipowner is found not to have been negligent.

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[4] Those benefits, after the 1972 Amendments, are relatively generous. The LHWCA claimant receives two-thirds of his lost wages, free of income taxes, and adjusted periodically for inflation, 33 U. S. C. §§ 906, 908; his medical and rehabilitation expenses are paid, § 907; and his attorney's fees are paid. § 928.

The problem of perceiving the equities arises because of the interaction of the compensation scheme and the tort scheme. If a longshoreman is injured while working on a vessel, and the stevedore is 100% at fault, no one considers it unjust that the longshoreman receives only statutory benefits. The award of less than full damages is the *quid pro quo* for the guarantee of recovery without regard to the employer's fault. Similarly, if a longshoreman is injured and the shipowner is 100% to blame, everyone agrees that it is fitting and proper for the shipowner to pay full damages. The Court, however, perceives "some inequity" in not allowing the longshoreman to obtain full damages when the shipowner has been determined to be only 20% negligent. Presumably, this same "inequity" would result if the longshoreman did not obtain full damages when the shipowner was 10% or 5% or even 1% negligent. This is not equity, however, but a windfall. Under the Court's rule, the longshoreman is guaranteed statutory compensation without regard to fault *and* is given a risk-free chance to obtain full damages if the shipowner is found negligent in even the slightest degree. A more evenhanded equity, in my view, would be for the longshoreman to recover damages for that portion of the injury for which the shipowner's negligence is responsible, and to recover the balance in statutory compensation, representing that portion of the injury for which the longshoreman is guaranteed an award regardless of fault.[5]

III

In sum, this case presents the relatively common situation where a statute is open to two interpretations, and the legislative history, although instructive as to the overriding purposes of Congress, provides no specific guidance as to which

[5] See Coleman & Daly, Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 35 Md. L. Rev. 351 (1976).

interpretation Congress would have adopted if it had addressed the precise issue. Our duty, in such a case, is to adopt the interpretation most consonant with reason, equity, and the underlying purposes Congress sought to achieve. If we are wrong, Congress can, as it has in the past, step in and adopt some other solution. But the problem should not be resolved by complacently accepting an unfair and unjust result, on the assumption the choice between the two interpretations ideally should be made by Congress. Under that approach, the Court and the country at large may end up with nothing more than an unfair and unjust result.

CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* BOLES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 78-808. Argued April 25, 1979—Decided June 27, 1979

Held: Section 202 (g) (1) of the Social Security Act restricting "mother's insurance benefits" to widows and divorced wives of wage earners does not violate the equal protection component of the Due Process Clause of the Fifth Amendment by thus denying such benefits to the mother of an illegitimate child because she was never married to the wage earner who fathered the child. Pp. 288-297.

(a) Such denial bears a rational relation to the Government's desire to ease the economic dislocation that occurs when the wage earner dies and the surviving parent is left with the choice to stay home and care for the children or to go to work. Congress could reasonably conclude that a woman who never married the wage earner is far less likely than one who did to be dependent upon the wage earner at the time of his death. Pp. 288-293.

(b) The incidental and, to a large degree, speculative impact of § 202 (g) (1) on illegitimate children as a class is not sufficient to treat the denial of "mother's insurance benefits" to unwed mothers as discrimination against the children. The focus of *these* benefits is on the economic dilemma of the surviving spouse or former spouse, whereas the needs, as such, of the minor children of the deceased wage earner are addressed through the separate "child's insurance benefits" provided by the Act. Pp. 293-296.

464 F. Supp. 408, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, WHITE, and BLACKMUN, JJ., joined, *post*, p. 297.

Harriet S. Shapiro argued the cause for appellant. With her on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock, William Kanter,* and *Susan A. Ehrlich.*

Herbert Semmel argued the cause for appellees. With him on the brief was *Nancy Duff Campbell.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Since the Depression of the 1930's, the Government has taken increasingly upon itself the task of insulating the economy at large and the individual from the buffeting of economic fortune. The federal old-age, survivors, and disability insurance provisions of the Social Security Act (SSA) are possibly the pre-eminent examples: attempts to obviate, through a program of forced savings, the economic dislocations that may otherwise accompany old age, disability, or the death of a breadwinner. As an exercise in governmental administration, the social security system is of unprecedented dimension; in fiscal year 1977 nearly 150 million claims were filed.[1]

Given this magnitude, the number of times these SSA claims have reached this Court warrants little surprise.[2] Our

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[1] Social Security Administration's Office of Management and Administration, The Year in Review: The Administration of Social Security Programs 1977, p. ii (July 1978).

[2] *Califano* v. *Yamasaki*, 442 U. S. 682 (1979); *Califano* v. *Jobst*, 434 U. S. 47 (1977); *Califano* v. *Webster*, 430 U. S. 313 (1977); *Califano* v. *Goldfarb*, 430 U. S. 199 (1977); *Mathews* v. *De Castro*, 429 U. S. 181 (1976); *Norton* v. *Mathews*, 427 U. S. 524 (1976); *Mathews* v. *Lucas*, 427 U. S. 495 (1976); *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); *Weinberger* v. *Salfi*, 422 U. S. 749 (1975); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *Richardson* v. *Wright*, 405 U. S. 208 (1972); *Richardson* v. *Belcher*, 404 U. S. 78 (1971); *Richardson* v. *Perales*, 402 U. S. 389 (1971); *Flemming* v. *Nestor*, 363 U. S. 603 (1960). Many other cases have been disposed of by summary action. This Court has also had numerous cases involving claims arising under federal-state cooperative welfare programs authorized by the SSA. See, *e. g.*, *Graham* v. *Richardson*, 403 U. S. 365 (1971) (Assistance to Persons Permanently and Totally Disabled); *California Human Resources Dept.* v. *Java*, 402 U. S. 121 (1971) (unemployment insurance); *Dandridge* v. *Williams*, 397 U. S. 471 (1970) (Aid to Families With Dependent Children).

cases evidence a sensitivity to the legislative and administrative problems posed in the design of such a program and in the adjudication of claims on this scale. The problems are generally of two types. The first is categorization.[3] In light of the specific dislocations Congress wishes to alleviate, it is necessary to define categories of beneficiaries. The process of categorization presents the difficulties inherent in any line-drawing exercise where the draftsman confronts a universe of potential beneficiaries with different histories and distinct needs. He strives for a level of generality that is administratively practicable, with full appreciation that the included class has members whose "needs" upon a statutorily defined occurrence may not be as marked as those of isolated individuals outside the classification. "General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Califano* v. *Jobst*, 434 U. S. 47, 53 (1977). A process of case-by-case adjudication that would provide a "perfect fit" in theory would increase administrative expenses to a degree that benefit levels would probably be reduced, precluding a

[3] The bulk of our cases fall under this heading. *Califano* v. *Jobst*, *supra* (termination of dependent child's benefits upon his marriage); *Califano* v. *Webster*, *supra* (gender-based differences in benefit computation); *Califano* v. *Goldfarb*, *supra* (gender-based differences in defining dependent of deceased wage earner); *Mathews* v. *De Castro*, *supra* (denial of "wife's insurance benefits" to divorced women under 62 years of age); *Norton* v. *Mathews*, *supra* (illegitimate children denied presumption of dependency enjoyed by legitimates); *Mathews* v. *Lucas*, *supra* (same as *Norton*); *Weinberger* v. *Salfi*, *supra* (duration-of-relationship requirements for receipt of mother's or child's insurance benefits); *Weinberger* v. *Wiesenfeld*, *supra* (gender-based denial of survivor's benefits to widowers); *Jimenez* v. *Weinberger*, *supra* (denial of disability insurance benefits to illegitimate children born after onset of wage earner's disability); *Richardson* v. *Belcher*, *supra* (reduction in social security benefits to reflect state workmen's compensation benefits); *Flemming* v. *Nestor*, *supra* (termination of insurance benefits to aliens upon their deportation).

perfect fit in fact. *Mathews* v. *Lucas*, 427 U. S. 495, 509 (1976); *Weinberger* v. *Salfi*, 422 U. S. 749, 776–777 (1975).

The second type of problem that has been brought to this Court involves the Social Security Administration's procedures for dispute resolution where benefits have been denied, decreased, or terminated because the Administration has concluded that the claimant is not entitled to what he has requested or to what he has received in the past.[4] Again the Court has been sensitive to the special difficulties presented by the mass administration of the social security system. After the legislative task of classification is completed, the administrative goal is accuracy and promptness in the actual allocation of benefits pursuant to those classifications. The magnitude of that task is not amenable to the full trappings of the adversary process lest again benefit levels be threatened by the costs of administration. *Mathews* v. *Eldridge*, 424 U. S. 319, 343–349 (1976); *Richardson* v. *Perales*, 402 U. S. 389, 406 (1971). Fairness can best be assured by Congress and the Social Security Administration through sound managerial techniques and quality control designed to achieve an acceptable rate of error.

This case involves a challenge to a categorization. Appellees Norman J. Boles and Margaret Gonzales represent a nationwide class of all illegitimate children and their mothers who are allegedly ineligible for insurance benefits under the SSA because in each case the mother was never married to the wage earner who fathered her child. Section 202 (g)(1) of the SSA, as amended, 42 U. S. C. § 402 (g)(1), only makes "mother's insurance benefits" available to widows and di-

[4] *Califano* v. *Yamasaki*, *supra* (lack of prerecoupment oral hearing in overpayment cases); *Mathews* v. *Eldridge*, *supra* (question whether evidentiary hearing necessary before termination of disability insurance benefits); *Richardson* v. *Wright*, *supra* (challenge to procedures employed in suspension or termination of disability benefits); *Richardson* v. *Perales*, *supra* (written reports by physicians who have examined disability insurance claimants are "substantial evidence" supporting denial of benefits).

vorced wives.[5] By virtue of this Court's decision in *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), "mother's insurance benefits" are available to widowers, leaving the title

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[5] Section 202 (g) (1), as set forth in 42 U. S. C. § 402 (g) (1), provides:

"(1) The widow and every surviving divorced mother (as defined in section 416 (d) of this title) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—

"(A) is not married,

"(B) is not entitled to a widow's insurance benefit,

"(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

"(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

"(E) at the time of filing such application has in her care a child or such individual entitled to a child's insurance benefit, and

"(F) in the case of a surviving divorced mother—

"(i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and

"(ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,

"shall (subject to subsection (s) of this section) be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such widow or surviving divorced mother becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widow's insurance benefit, she remarries, or she dies. Entitlement to such benefits shall also end, in the case of a surviving divorced mother, with the month immediately preceding the first month in which no son, daughter, or legally adopted child of such surviving divorced mother is entitled to a child's insurance benefit on the basis of the wages and self-employment income of such deceased individual."

Section 216 (d) (3), 42 U. S. C. § 416 (d) (3), states:

"(3) The term 'surviving divorced mother' means a woman divorced from an individual who has died, but only if (A) she is the mother of his

of these benefits a misnomer. There we held that the provision of such benefits only to women violated the Due Process Clause of the Fifth Amendment.

Norman W. Boles died in 1971. He left a widow, Nancy L. Boles, and their two children, who were each promptly awarded child's insurance benefits. Nancy Boles receives mother's insurance benefits. Appellee Gonzales lived with Norman W. Boles for three years before his marriage to Nancy Boles and bore a son by him, Norman J. Boles.[6] Gonzales sought mother's insurance benefits for herself and child's benefits for her son. Her son was granted benefits, but her personal request was denied because she had never been married to the wage earner.

Gonzales exhausted her administrative remedies and then filed this suit in the United States District Court for the Western District of Texas. The District Court certified a class of "all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U. S. C. § 402 (g)(1) restricts such benefits to women who were once married to the fathers of their children." App. to Juris. Statement 1a–2a. The District Court found that § 202 (g)(1) of the SSA was unconstitutional. There were three steps in its logic.

First, it read *Weinberger* v. *Wiesenfeld, supra,* as holding that mother's insurance benefits are chiefly for the benefit of the child. It quoted from a passage in that opinion where this Court observed:

> "[Section] 402 (g), linked as it is directly to responsibility for minor children, was intended to permit women to elect

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son or daughter, (B) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of 18, (C) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of 18, or (D) she was married to him at the time both of them legally adopted a child under the age of 18."

[6] Norman W. Boles had acknowledged his paternity of Norman J. Boles.

not to work and to devote themselves to the care of children. . . .

"That the purpose behind § 402 (g) is to provide children deprived of one parent with the opportunity for the personal attention of the other could not be more clear in the legislative history." 420 U. S., at 648–649.

On the basis of this language it then concluded that for purposes of equal protection analysis, the pertinent discrimination in this case is not unequal treatment of unwed mothers, but rather discrimination against illegitimate children. In its final step the District Court held that the application of § 202 (g)(1) at issue here is unconstitutional, relying on cases of this Court invalidating on constitutional grounds legislation that discriminated against illegitimates solely because of their status at birth. *E. g., Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972); *Gomez* v. *Perez*, 409 U. S. 535 (1973); *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974); *Trimble* v. *Gordon*, 430 U. S. 762 (1977).

We noted probable jurisdiction, 439 U. S. 1126 (1979), and now conclude that the District Court incorrectly analyzed the equal protection issue in this case. We accordingly reverse.

As this Court noted in *Weinberger* v. *Wiesenfeld, supra*, at 643, § 202 (g) "was added to the Social Security Act in 1939 as one of a large number of amendments designed to 'afford more adequate protection to the family as a unit.' H. R. Rep. No. 728, 76th Cong., 1st Sess., 7 (1939)." The benefits created in 1939 "were intended to provide persons dependent on the wage earner with protection against the economic hardship occasioned by loss of the wage earner's support." *Califano* v. *Jobst*, 434 U. S., at 50; see *Mathews* v. *De Castro*, 429 U. S. 181, 185–186 (1976). Specifically, § 202 (g) "was intended to permit women [and now men] to elect not to work and to devote themselves to care of children." 420 U. S., at 648. The animating concern was the economic dislocation that occurs when the wage earner dies and the sur-

viving parent is left with the choice to stay home and care for the children or to go to work, a hardship often exacerbated by years outside the labor force. "Mother's insurance benefits" were intended to make the choice to stay home easier. But the program was not designed to be, and we think is not now, a general system for the dispensing of child-care subsidies.[7] Instead, Congress sought to limit the category of beneficiaries to those who actually suffer economic dislocation upon the death of a wage earner and are likely to be confronted at that juncture with the choice between employment or the assumption of full-time child-care responsibilities.

In this light there is an obvious logic in the exclusion from § 202 (g) of women or men who have never married the wage earner. "Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status." *Califano* v. *Jobst, supra,* at 53. Congress could reasonably conclude that a woman who has never been married to the wage earner is far less likely to be dependent upon the wage earner at the time of his death. He was never legally required to support her and therefore was less likely to have been an important source of income. Thus, the possibility of severe economic dislocation upon his death is more remote.

We confronted an analogous classification in *Mathews* v. *De Castro, supra,* which involved a challenge to the exclusion of divorced women from "wife's income benefits." In concluding that the classification did not deny equal protection, we observed:

> "Divorce by its nature works a drastic change in the economic and personal relationship between a husband

[7] *Califano* v. *Jobst,* 434 U. S., at 52:

"The statute is designed to provide the wage earner and the dependent members of his family with protection against the hardship occasioned by his loss of earnings; it is not simply a welfare program generally benefiting needy persons."

See also *Mathews* v. *De Castro,* 429 U. S., at 185–186.

> and wife. . . . Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married. The problems that a divorced wife may encounter when her former husband becomes old or disabled may well differ in kind and degree from those that a woman married to a retired or disabled husband must face. . . . She may not feel the pinch of the extra expenses accompanying her former husband's old age or disability. . . . It was not irrational for Congress to recognize this basic fact in deciding to defer monthly payments to divorced wives of retired or disabled wage earners until they reach the age of 62." 429 U. S., at 188–189.

Likewise, *Weinberger* v. *Salfi*, 422 U. S. 749 (1975), upheld a 9-month duration-of-relationship eligibility requirement for the wife and stepchildren of a deceased wage earner. The stated purpose of the requirement was "to prevent the use of sham marriages to secure Social Security payments." *Id.*, at 767. We found that the only relevant constitutional argument was whether "the test [appellees could not] meet [was] not so rationally related to a legitimate legislative objective that it [could] be used to deprive them of benefits available to those who [did] satisfy that test." *Id.*, at 772. We recognized that the statutory requirement would deny benefits in some cases of legitimate, sincere marriage relationships.

> "While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham relationships, and of relying on a rule which may not exclude some obviously sham arrangements, we think it clear that Congress could rationally choose to adopt such a course. Large numbers of people are eligible for these programs and are potentially subject to inquiry as to the validity of their relationships to wage earners. . . . Not only does the prophylactic approach thus obviate the

necessity for large numbers of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriages." *Id.*, at 781–782.

It is with this background that we must analyze what the District Court in this case perceived to be the flaw in relying on dependence as a rationale for the statutory distinction between married and unmarried persons. The District Court pointed out that in 1972 Congress lifted the requirement that divorced women seeking mother's insurance benefits show that they were in some measure dependent on the wage earner immediately before his death.[8] It seized this fact as refutation of any characterization of these benefits as an attempt to ease the dislocation of those who had been dependent on the deceased. We think the District Court is demanding a precision not warranted by our cases.

Certainly Congress did not envision such precision. The legislative history surrounding the devolution of support requirements suggests that its effect on mother's insurance benefits was an incidental and relatively minor byproduct of

[8] Originally, nothing similar to mother's insurance benefits for divorced women was provided by the SSA. Then in 1950 these benefits, subject to limitations not relevant here, were made available to a surviving divorced wife, if she had not remarried, had a child in her care entitled to child's insurance benefits, and at the time of the wage earner's death had been receiving at least one-half of her support from him. Act of Aug. 28, 1950, § 101 (a), 64 Stat. 485.

In 1965, the remarriage bar to mother's insurance benefits was relaxed. A woman's rights as a surviving divorced mother would be restored if her second marriage ended in divorce. Moreover, a showing that she was receiving or entitled to receive "substantial contributions" from the wage earner at the time of his death would suffice in lieu of a showing that she received at least one-half of her support from the wage earner. Old-Age, Survivors, and Disability Amendments of 1965, § 308, 79 Stat. 377–379.

Finally, in 1972 Congress made the changes discussed by the District Court. Social Security Amendments of 1972, § 114 (c), 86 Stat. 1348.

Congress' core concern: older women who were married to wage earners for over 20 years—women who often only knew work as housewives—and who were not eligible for surviving divorced wife's insurance benefits because state divorce laws did not permit alimony or because they had accepted a property settlement in lieu of alimony.[9] The Social Security laws

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[9] Interestingly, younger women receiving mother's benefits are not even mentioned in the Committee Reports on the 1972 amendment.

"Benefits, under present law, are payable to a divorced wife age 62 or older and a divorced widow age 60 or older if her marriage lasted at least 20 years before the divorce, and to a surviving divorced mother. In order to qualify for any of these benefits a divorced woman is required to show that: (1) she was receiving at least one-half of her support from her former husband; (2) she was receiving substantial contributions from her former husband pursuant to a written agreement; or (3) there was a court order in effect providing for substantial contributions to her support by her former husband.

"In some States the courts are prohibited from providing for alimony, and in these States a divorced woman is precluded from meeting the third support requirement. Even in States which allow alimony, the court may have decided at the time of the divorce that the wife was not in need of financial support. Moreover, a divorced woman's eligibility for social security benefits may depend on the advice she received at the time of her divorce. If a woman accepted a property settlement in lieu of alimony, she could, in effect, have disqualified herself for divorced wife's, divorced widow's, or surviving divorced mother's benefits.

"The intent of providing benefits to divorced women is to protect women whose marriages are dissolved when they are far along in years—particularly housewives who have not been able to work and earn social security protection of their own. The committee believes that the support requirements of the law have operated to deprive some divorced women of the protection they should have received and, therefore, recommends that these requirements be eliminated. The requirement that the marriage of a divorced wife or widow must have lasted for at least 20 years before the divorce would not be changed." S. Rep. No. 92-1230, p. 142 (1972).

See H. R. Rep. No. 92-231, pp. 54-55 (1971). When the 1965 changes were made there was only passing mention of younger women receiving mother's insurance benefits. S. Rep. No. 404, 89th Cong., 1st Sess., 108 (1965).

have maintained uniform support requirements for divorced wife's, divorced widow's, and surviving divorced mother's benefits. Obviously administration is thereby simplified. Undoubtedly, some younger divorced wives with children of deceased wage earners in their care who could not meet the old support requirements incidentally benefit from Congress' concern that many older women were being victimized once by state divorce laws and again by the Social Security laws.[10] However, when Congress seeks to alleviate hardship and inequity under the Social Security laws, it may quite rightly conceive its task to be analogous to painting a fence, rather than touching up an etching. We have repeatedly stated that there is no constitutional requirement that "a statutory provision . . . filte[r] out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute." *Weinberger* v. *Salfi*, 422 U. S., at 777; *Mathews* v. *De Castro*, 429 U. S., at 189. In sum, we conclude that the denial of mother's insurance benefits to a woman who never married the wage earner bears a rational relation to the Government's desire to ease economic privation brought on by the wage earner's death.

But the appellees argue that to characterize the problem in this fashion is to miss the point because at root this case involves discrimination against illegitimate children. Quite naturally, those who seek benefits denied them by statute will frame the constitutional issue in a manner most favorable to their claim. The proper classification for purposes of equal

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[10] There are no precise figures as to the extra cost to the insurance fund posed by this expansion of mother's insurance benefits. It can be inferred from the attention this expansion received in the legislative history that its cost was a relatively small part of the $23 million annual increase in benefits estimated for eliminating support requirements across the board. See S. Rep. No. 92-1230, *supra*, at 142. The Department of Health, Education, and Welfare has estimated that compliance with the District Court's decision in this case will cost $60 million annually.

protection analysis is not an exact science, but scouting must begin with the statutory classification itself. Only when it is shown that the legislation has a substantial disparate impact on classes defined in a different fashion may analysis continue on the basis of the impact on those classes.

We conclude that the legislation in this case does not have the impact on illegitimates necessary to warrant further inquiry whether § 202 (g) is the product of discriminatory purposes. See *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979). "Mother's insurance benefits" are distinct from "child's insurance benefits." The latter are benefits paid to the minor children of the deceased wage earner [11] and, as noted, Gonzales' son did receive child's insurance benefits. The benefit to a child as a result of the parent or guardian's receipt of mother's insurance benefits is incidental: mother's insurance benefit payments do not vary with the number of children within the recipient's care, they are not available in the foster care context, and they are lost on remarriage or if the surviving parent earns a substantial income—all despite the needs of the child. Thus, the focus of *these* benefits is on the economic dilemma of the surviving spouse or former spouse; the child's needs as such are addressed through the separate child's insurance benefits.[12] Nor

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[11] In *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974), this Court struck down an absolute bar to child's insurance benefits for illegitimate children whose paternity had never been acknowledged or affirmed by evidence of domicile with, or support by, the wage earner before the onset of the disability.

[12] There is obviously a significant difference between this interpretation of the statutory purpose and that subscribed to by the author of this opinion in his separate concurrence in *Weinberger* v. *Wiesenfeld*, 420 U. S., at 655. To the extent that these interpretations conflict, the author feels he can do no better than quote Mr. Justice Jackson, concurring in *McGrath* v. *Kristensen*, 340 U. S. 162, 177–178 (1950):

"Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, *License Cases*, 5 How. 504, recanting views he

is it invariably true that whatever derivative benefits are enjoyed by the child whose parent or guardian receives mother's insurance benefits will not be enjoyed by illegitimate children. If the illegitimate child is cared for by the deceased wage earner's wife, she will receive mother's insurance benefits even though she has no natural children of her own and never adopted the child.[13] And many legitimate children live in households that are not headed by individuals eligible for mother's benefits.

In order to make out a disparate impact warranting further scrutiny under the Due Process Clause of the Fifth Amendment, it is necessary to show that the class which is purportedly discriminated against consequently suffers significant deprivation of a benefit or imposition of a substantial burden. If the class of beneficiaries were expanded in the fashion pressed by appellees, the beneficiaries, in terms of those who would exercise dominion over the benefits and whose freedom of choice would be enhanced thereby, would be unwed mothers, not illegitimate children. Certainly every governmental benefit has a ripple effect through familial relationships and the economy generally, its propagation determined by the proximity and sensibilities of others. Possibly the largest class of incidental beneficiaries are those who are gratified in a nonmaterial way to see a friend or relative re-

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had pressed upon the Court as Attorney General of Maryland in *Brown* v. *Maryland*, 12 Wheat. 419. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, 'The matter does not appear to me now as it appears to have appeared to me then.' *Andrews* v. *Styrap*, 26 L. T. R. (N. S.) 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: 'My own error, however, can furnish no ground for its being adopted by this Court . . . .' *United States* v. *Gooding*, 12 Wheat. 460, 478. . . . If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."

[13] Compare 42 U. S. C. § 402 (g) (1) (E) with § 402 (g) (1) (F) (i).

ceive benefits. Some limits must be imposed for purposes of constitutional analysis, and we conclude that in this case the incidental and, to a large degree, speculative impact on illegitimates as a class is not sufficient to treat the denial of mother's insurance benefits to unwed mothers as discrimination against illegitimate children.

The SSA and its amendments are the product of hard choices and countervailing pressures. The desire to alleviate hardship wherever it is found is tempered by the concern that the social security system in this country remain a contributory insurance plan and not become a general welfare program. General welfare objectives are addressed through public assistance legislation. In light of the limited resources of the insurance fund, any expansion of the class of beneficiaries invariably poses the prospect of reduced benefits to individual claimants. We need look no further than the facts of this case for an illustration. The benefits available to Norman W. Boles' beneficiaries under the Act are limited by his earnings record. The effect of extending benefits to Gonzales will be to reduce benefits to Nancy Boles and her children by 20%.[14] Thus, the end result of extending benefits to Gonzales may be to deprive Nancy Boles of a meaningful choice between full-time employment and staying home with her children, thereby undermining the express legislative purpose of mother's insurance benefits. We think Congress could rationally choose to concentrate limited funds where the need is likely to be greatest.

Because of our disposition of the Fifth Amendment issue, we need not and do not reach the appellant's other arguments: that the District Court improperly certified a nationwide class that included individuals who were not shown to have met the jurisdictional requirements of § 205 (g) of the

[14] Brief for Appellant 29 n. 22.

SSA, 42 U. S. C. § 405 (g),[15] and that sovereign immunity barred that court's award of retroactive monetary relief.

The judgment of the District Court is accordingly

Reversed.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join, dissenting.

The critical question in this dispute is whether § 202 (g) of the Social Security Act, 42 U. S. C. § 402 (g), discriminates against unmarried parents or against illegitimate children. The Court determines that the intended beneficiaries of § 202 (g) are dependent spouses, and that the statute therefore distinguishes between categories of parents. Having thus characterized the statute, the Court concludes that the use of marital status as an index of dependency on a deceased wage earner is permissible under *Califano* v. *Jobst*, 434 U. S. 47, 50 (1977), and *Mathews* v. *De Castro*, 429 U. S. 181, 185–186 (1976). If, however, as the District Court found, the statute benefits children, then it incorporates a distinction based on legitimacy which must be tested under the more rigorous standards of *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974), and *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972).

Determining the proper classification for purposes of equal protection analysis is, to be sure, not "an exact science." *Ante*, at 294. But neither is it an exercise in statutory revision. And only by disregarding the clear legislative history, structure, and effect of the Mother's Insurance Benefits Program can the Court characterize dependent spouses, rather than children, as the intended beneficiaries of § 202 (g). Just four Terms ago, a unanimous Court concluded that the clear purpose underlying § 202 (g) "is to provide children deprived of one parent with the opportunity for the personal attention

[15] See *Califano* v. *Yamasaki*, 442 U. S. 682 (1979).

of the other." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648–649 (1975).[1] Indeed, the author of today's opinion for the Court concurred separately in *Wiesenfeld* on the ground that an examination of the legislative history and statutory context of § 202 (g) "convincingly demonstrates that the *only* purpose of [§ 202 (g)] is to make it possible for children of deceased contributing workers to have the personal care and attention of a surviving parent." 420 U. S., at 655 (REHNQUIST, J., concurring) (emphasis added). That same legislative history and statutory context now persuade the Court that the "animating concern" of § 202 (g) is to assist a surviving spouse, and that any benefit to a child is merely "incidental." *Ante*, at 288–289, 294. I cannot agree. In my judgment, the history and structure of the Act establish as "convincingly" here as they did in *Wiesenfeld* that § 202 (g) was designed to aid children. And because denial of support for illegitimates bears no substantial relationship to that purpose, I respectfully dissent.

I

The Court concedes, as it must, that Congress intended the Mother's Insurance Benefits Program to enable surviving spouses to stay at home and care for their children. *Ante*, at 288. Despite this concession, the Court manages to conclude that the sole beneficiaries of the program, for equal protection purposes, are the spouses who provide care, not the children who receive it. Unencumbered by any direct support from the legislative history, the Court reaches this conclusion by positing that the program was designed to aid surviving parents who "actually suffer economic dislocation upon the death of a wage earner." *Ante*, at 289. Given this asserted pur-

[1] In *Wiesenfeld*, the Court held that § 202 (g)'s denial of benefits to widowers reflected impermissible gender-based discrimination. In so ruling, we reasoned that classifications based on the sex of the surviving parent bore no relationship to the statutory objective of enabling children who had lost one parent to receive full-time care by the other. See 420 U. S., at 651.

pose, the Court finds "obvious logic" in § 202 (g)'s exclusion of unwed mothers, since "Congress could reasonably conclude that a woman who has never been married to the wage earner is far less likely to be dependent upon the wage earner at the time of his death." *Ante*, at 289. However, neither the history nor structure of the statute supports the Court's determination that Congress enacted § 202 (g) to assist dependent spouses rather than their children.

Aid to surviving parents was first extended under the Social Security Act Amendments of 1939 in the form of "widows' benefits." The Advisory Council on Social Security, which formulated the program, indicated that payments were "intended as supplements to the orphans' benefits with the purpose of enabling the widow to remain at home and care for the children." Final Report of the Advisory Council on Social Security 31 (1938). Proposals to grant benefits to dependent widows without minor children were rejected, on the apparent theory that young childless women could work and older widows would have savings or grown children able to assist them. Report of the Social Security Board, H. R. Doc. No. 110, 76th Cong., 1st Sess., 7–8 (1939). See also H. R. Rep. No. 728, 76th Cong., 1st Sess., 36–37 (1939); Hearings on the Social Security Act Amendments of 1939 before the House Committee on Ways and Means, 76th Cong., 1st Sess., 61 (1939). Subsequent re-enactments of the program reflected no change in the underlying statutory objective—to allow surviving parents "to stay home and care for [their] children instead of working." 1971 Advisory Council on Social Security, Reports on the Old-Age, Survivors, and Disability Insurance and Medicare Programs 30 (1971).

Moreover, the entire structure of the statute belies the Court's determination that Congress intended mother's insurance to aid a wage earner's economically dependent spouse rather than his children. Section 202 (g) imposes no express requirement of dependency. As the District Court noted,

mothers and their legitimate children may obtain benefits under § 202 (g) "regardless of whether [the wage earner] was living with them or supporting them at the time of his death, or even if he never lived with or supported them." 464 F. Supp. 408, 412 (WD Tex. 1978). By contrast, an unmarried mother and her child who were fully dependent on the insured nonetheless remain ineligible for assistance under § 202 (g). That divorced parents and their children qualify for mother's insurance further undercuts the Court's attempted linkage between the marital requirement and dependency. A woman previously married to a deceased wage earner is eligible for benefits even if neither she nor her child ever received support from the father, and even if the father was excused from any legal support obligations in the divorce proceedings. Indeed, a mother whose second marriage terminates in death or divorce may claim benefits on the account of her first husband although in all likelihood, any entitlement to support terminated upon her remarriage. See 464 F. Supp., at 413.[2] In short, nothing in the structure or history of the statute sustains the Court's conclusion that the purpose of § 202 (g) is to benefit dependent spouses as opposed to children.

Equally untenable is the Court's further determination that § 202 (g) has insufficient discriminatory impact on illegitimates to warrant further analysis. See *ante*, at 294. In con-

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[2] The Court dismisses this awkward fact with an equally awkward metaphor. In the Court's view, Congress' inclusion of divorced parents represents an attempt to "alleviate hardship and inequity under the Social Security laws." *Ante*, at 293. And, under the Court's analysis, when Congress undertakes such an endeavor, "it may quite rightly conceive its task to be analogous to painting a fence, rather than touching up an etching." *Ibid.* But this characterization of legislative technique elides the issue relevant here, the purpose of the statutory scheme. Metaphor cannot mask the significance of Congress' decision to confer benefits on divorced spouses. That these individuals may obtain mother's insurance of itself negates the proposition that the painter-draftsman was concerned with assisting dependent parents rather than their children.

cluding that § 202 (g) has no such disparate effect, the Court reasons first that

> "[t]he benefit to a child as a result of the parent or guardian's receipt of mother's insurance benefits is incidental: mother's insurance benefit payments do not vary with the number of children within the recipient's care, they are not available in the foster care context, and they are lost on remarriage or if the surviving parent earns a substantial income . . . ." *Ante*, at 294.

But none of these enumerated eligibility requirements support the Court's characterization of children as "incidental" rather than intended beneficiaries of § 202 (g). On the contrary, these restrictions, together with two others the Court neglects to mention, are consistent with the stated purpose of the program—to afford parents who would otherwise be forced to work the option of caring for their children at home. That objective is plainly served by eligibility limitations excluding individuals whose economic resources already permit such a choice. Factors including remarriage, outside income, and qualification for foster care payments directly or indirectly reflect such resources; the number of the recipient's children does not. Similarly, the conditions that mother's benefits cease when a child reaches 18 or leaves the parent's care and custody, see § 202 (d)(5), 42 U. S. C. § 402 (d)(5), also reinforce the conclusion that children are the actual beneficiaries of § 202 (g). For the parent's eligibility continues "only so long as it is realistic to think that the children might need their parent at home." *Weinberger* v. *Wiesenfeld*, 420 U. S., at 650 n. 17.

The Court further submits that the discriminatory impact of § 202 (g) is not of constitutional dimension because an illegitimate child could conceivably obtain benefits if he leaves the home of his natural mother to live with his deceased father's wife. This suggestion, of course, presupposes both an extraordinary beneficence on the part of the wife, and no

strong attachment between the natural mother and her child, assumptions which the Court does not and could not defend.[3] And forcing a child to forgo living with his natural mother in order to obtain assistance under § 202 (g) hardly comports with the articulated purpose of the program, to encourage parental care.

In any event, as this Court's prior holdings amply demonstrate, a statute that disadvantages illegitimates as a class is not saved simply because not all members of that class are penalized under all conceivable circumstances. For example, in both *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), and *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974), we rejected an argument that illegitimates suffered no discrimination under statutes extending benefits to legitimate children but only to certain categories of illegitimates.[4] Similarly, in

[3] Although statistics in this area are difficult to obtain, available data reveal that a very high percentage of illegitimate children reside with their natural mothers. Approximately one-half of all illegitimate births are to women under age 20, see Department of Health, Education, and Welfare, Monthly Vital Statistics Report, Final Natality Statistics, 1977, p. 19 (Feb. 1979), and studies indicate that between 86% and 93% of these mothers are living with their children. See Report by the Alan Guttmacher Institute, Research and Development Division of the Planned Parenthood Federation of America, 11 Million Teenagers 11 (1976) (hereinafter cited as Planned Parenthood Report); F. Furstenberg, Unplanned Parenthood 174 (1966) (hereinafter cited as Furstenberg); Zelnik & Kantner, the Resolution of Teenage First Pregnancies, 6 Family Planning Perspectives 77 (1974) (Table 5). Comparable figures have been reported for mothers over age 20. See Wisconsin Department of Health and Social Services, Unmarried Mothers in Wisconsin, 1974 (1975) (Tables 11, 13). The remaining children are residing with either adoptive parents or other individuals. See Planned Parenthood Report 11; Furstenberg 174. One in-depth study found that the latter separations were generally attributable to the mother's illness or inability to obtain child care during hours of employment. *Ibid.*

[4] Under the workmen's compensation statute at issue in *Weber*, illegitimate children could recover benefits on the same basis as legitimates only if acknowledged by their fathers. See 406 U. S., at 167–168. *Jimenez* involved a statute granting disability insurance benefits to illegitimates

Trimble v. *Gordon*, 430 U. S. 762 (1977), the Court held unconstitutional a statute denying illegitimate children the right to inherit from their intestate fathers even though illegitimates whose fathers wrote wills were not disadvantaged by the provision. So too here, the Court cannot dismiss the discriminatory impact of § 202 (g) by a "hypothetical reshuffling of the facts," *Trimble* v. *Gordon*, *supra*, at 774, particularly one that disregards the very relationship between a surviving single parent and child which the statute was intended to foster.

Finally, the Court suggests that § 202 (g) does not disadvantage illegitimates in any constitutionally cognizable sense because it is surviving spouses, not their children, who "exercise dominion over the benefits and whose freedom of choice [is] enhanced thereby." *Ante*, at 295. However, that the parent makes the decision to stay at home does not render the child any less the beneficiary of that choice. As a practical matter, the parent also exercises "dominion" over the children's insurance benefits afforded by § 202 (d) of the Act, 42 U. S. C. § 402 (d), but the child is nonetheless the recipient. Children now become "incidental" and "speculative" beneficiaries of § 202 (g) only because the Court declares them to be so.

I would adhere to the understanding, unanimously expressed in *Wiesenfeld*, that the Mother's Insurance Program, both in purpose and effect, is a form of assistance to children. Thus, the statute's eligibility restrictions should be evaluated as they in fact operate, as discrimination based on legitimacy.

II

Statutes that foreclose opportunities solely because of a child's status at birth represent a particularly invidious form

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where: (1) state law permitted them to inherit from the wage earner; (2) their illegitimacy resulted from formal or nonobvious defects in their parents' marriage ceremony; (3) they had subsequently been legitimated; or (4) the disabled wage-earning parent had contributed to their support or had lived with them prior to disability. See 417 U. S., at 631, and n. 2.

of discrimination. *Gomez* v. *Perez*, 409 U. S. 535 (1973); *Levy* v. *Louisiana*, 391 U. S. 68 (1968). To penalize an illegitimate child for conduct he could not prevent and a status he cannot alter is both "illogical and unjust." *Weber* v. *Aetna Casualty & Surety Co.*, *supra*, at 175. Accordingly, classifications based on legitimacy violate the equal protection requirements of the Fifth Amendment [5] unless they bear a close and substantial relationship to a permissible governmental interest. See *Jimenez* v. *Weinberger*, *supra*, at 637; *Mathews* v. *Lucas*, 427 U. S. 495, 509–510 (1976).

In arguing that § 202 (g) meets this test, the Secretary suggests that legitimate children as a class are more likely than illegitimates to be dependent on the insured wage earner at the time of his death. Therefore, because the statute establishes a maximum amount payable to any one wage earner's survivors, the Secretary contends that the exclusion of illegitimates is an appropriate means of allocating finite resources to those most likely to have suffered economically from the insured's death. Brief for Appellant 28.

The threshold difficulty with this argument is that § 202 (g)'s marital restriction bars recovery by illegitimates regardless of whether any other individuals are eligible to claim benefits on a particular wage earner's account. Thus, the restriction defended here as a rationing device withholds assistance to illegitimates even when there are no competing claimants among whom to ration. Insofar as the exclusion of illegitimates is designed to allocate limited funds on the basis of need, it is not carefully tailored to achieve that objective. See *Trimble* v. *Gordon*, *supra*, at 770–771; *Gomez* v. *Perez*, *supra*, at 538.[6]

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[5] See *Vance* v. *Bradley*, 440 U. S. 93, 94–95, n. 1 (1979); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

[6] That Congress has established a maximum which cannot fully provide for all survivors affords no basis for preferring legitimate children over dependent illegitimates. See *Weber* v. *Aetna Casualty & Surety Co.*, 406

But even if § 202 (g)'s marital restriction operated only in contexts of multiple claimants, it could not withstand scrutiny under *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), and *Jimenez* v. *Weinberger*, 417 U. S. 628 (1974). In both those cases, the Court recognized that the marital status of parents is not a sufficiently accurate index of the economic needs of their children to warrant conclusively denying assistance to illegitimates. At issue in *Weber* was a workmen's compensation scheme which provided that unacknowledged illegitimate children could recover on the account of an insured only if payments to other eligible claimants did not exhaust the maximum allowable benefits. Noting that an unacknowledged illegitimate child "may suffer as much from the loss of a parent as a child born within wedlock," 406 U. S., at 169, the Court declined to view status at birth as an adequate proxy for economic dependence. See also *Richardson* v. *Griffin*, 409 U. S. 1069 (1972), summarily aff'g 346 F. Supp. 1226 (Md.); *Richardson* v. *Davis*, 409 U. S. 1069 (1972), summarily aff'g 342 F. Supp. 588 (Conn.). Again in *Jimenez* v. *Weinberger*, we struck down a statute granting social security benefits to a disabled worker's legitimate children born after the onset of disability but not to afterborn illegitimate children except under certain limited circumstances. See n. 4, *supra*. The constitutional infirmities identified in *Jimenez* are equally evident in this case; that statute, like § 202 (g), was overinclusive to the extent it aided legitimate children not actually dependent on the insured wage earner, and underinclusive to the extent it withheld assistance from illegitimate children who were in fact dependent. And here, as in *Jimenez*, it serves no purpose consistent with the aims of the Social Security Act to deny illegitimates all op-

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U. S. 164, 175–176 (1972); *Richardson* v. *Griffin*, 409 U. S. 1069 (1972), summarily aff'g 346 F. Supp. 1226 (Md.); *Richardson* v. *Davis*, 409 U. S. 1069 (1972), summarily aff'g 342 F. Supp. 588 (Conn.).

portunity to establish their dependence and their concomitant right to insurance benefits. See 417 U. S., at 636.[7]

We cannot, of course, expect perfect congruence between legislative ends and means in the administration of a complex statutory scheme. See *ante*, at 284–285. But neither should we give our imprimatur to distinctions needlessly predicated on a disfavored social status, particularly one beyond an individual's power to affect. Although a "blanket and conclusive exclusion" of illegitimate children may be an administratively expedient means of screening for dependence under § 202 (g), see *Jimenez* v. *Weinberger*, *supra*, at 636, it is also inaccurate, unjust, and, under this Court's settled precedents, unconstitutional.

I respectfully dissent.

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[7] Unlike the statute upheld in *Mathews* v. *Lucas*, 427 U. S. 495 (1976), which presumed the dependence of legitimate children but required proof of dependence by illegitimates, § 202 (g) conclusively bars recovery even to those illegitimates who could establish that they were supported by the deceased wage earner at the time of his death.

Syllabus

JACKSON *v.* VIRGINIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78–5283. Argued March 21, 1979—Decided June 28, 1979

Petitioner was convicted of first-degree murder after a bench trial in a Virginia court, and his motion and petition in the state courts to set aside the conviction on the ground that there was insufficient evidence of premeditation, a necessary element of first-degree murder, were denied. He then brought a habeas corpus proceeding in Federal District Court, which, applying the "no evidence" criterion of *Thompson* v. *Louisville*, 362 U. S. 199, found the record devoid of evidence of premeditation and granted the writ. Applying the same criterion, the Court of Appeals reversed, holding that there was some evidence that petitioner had intended to kill the victim.

Held:

1. A federal habeas corpus court must consider not whether there was *any* evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *In re Winship*, 397 U. S. 358. Pp. 313–324.

(a) *In re Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Pp. 313–316.

(b) After *In re Winship*, the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed on reasonable doubt, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The relevant question is whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The *Thompson* "no evidence" rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt. Pp. 316–320.

(c) In a challenge to a state conviction brought under 28 U. S. C. § 2254, which requires a federal court to entertain a state prisoner's claim that he is being held in "custody in violation of the Constitution

or laws or treaties of the United States," the applicant is entitled to habeas corpus relief if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Pp. 320–324.

2. A review of the record in this case in the light most favorable to the prosecution shows that a rational factfinder could have found petitioner guilty beyond a reasonable doubt of first-degree murder under Virginia law. Pp. 324–326.

580 F. 2d 1048, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 326. POWELL, J., took no part in the consideration or decision of the case.

Carolyn J. Colville, by appointment of the Court, 439 U. S. 1064, argued the cause *pro hac vice* and filed briefs for petitioner.

Marshall Coleman, Attorney General of Virginia, argued the cause for respondents. With him on the brief was *Linwood T. Wells*, Assistant Attorney General.*

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*Briefs of *amici curiae* urging affirmance were filed by *George Deukmejian*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Arnold O. Overoye*, Assistant Attorney General, and *Eddie T. Keller*, *Willard F. Jones*, and *Jane K. Fischer*, Deputy Attorneys General, for the State of California; by *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, *Don A. Langham*, First Assistant Attorney General, *John C. Walden*, Senior Assistant Attorney General, and *Susan V. Boleyn*, Assistant Attorney General, for the State of Georgia; by *Frank J. Kelley*, Attorney General, *Robert A. Derengoski*, Solicitor General, and *Thomas L. Casey*, Assistant Attorney General, for the State of Michigan; and for their respective States by *Theodore L. Sendak*, Attorney General, *David A. Arthur*, Deputy Attorney General, and *Donald P. Bogard*, of Indiana, *Robert B. Hansen*, Attorney General of Utah, *Edward G. Biester, Jr.*, Attorney General of Pennsylvania, *Paul L. Douglas*, Attorney General of Nebraska, and *Chauncey H. Browning*, Attorney General of West Virginia.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U. S. 358. The question in this case is what standard is to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted in a state court upon insufficient evidence.

I

The petitioner was convicted after a bench trial in the Circuit Court of Chesterfield County, Va., of the first-degree murder of a woman named Mary Houston Cole.[1] Under Virginia law, murder is defined as "the unlawful killing of another with malice aforethought." *Stapleton* v. *Commonwealth*, 123 Va. 825, 96 S. E. 801. Premeditation, or specific intent to kill, distinguishes murder in the first from murder in the second degree; proof of this element is essential to conviction of the former offense, and the burden of proving it clearly rests with the prosecution. *Shiflett* v. *Commonwealth*, 143 Va. 609, 130 S. E. 777; *Jefferson* v. *Commonwealth*, 214 Va. 432, 201 S. E. 2d 749.

That the petitioner had shot and killed Mrs. Cole was not in dispute at the trial. The State's evidence established that

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[1] The degrees of murder in Virginia are specified in Va. Code § 18.2–32 (1975) as follows:

"Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery, burglary or abduction . . . is murder of the first degree, punishable as a Class 2 felony.

"All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony."

Class 2 felonies carry a term of 20 years to life. § 18.2–10 (b) (1975). The sentence for Class 3 felonies can range from 5 to 20 years, § 18.2–10 (c). Murder itself takes its definition in Virginia from the common law. *Stapleton* v. *Commonwealth*, 123 Va. 825, 96 S. E. 801.

she had been a member of the staff at the local county jail, that she had befriended him while he was imprisoned there on a disorderly conduct charge, and that when he was released she had arranged for him to live in the home of her son and daughter-in-law. Testimony by her relatives indicated that on the day of the killing the petitioner had been drinking and had spent a great deal of time shooting at targets with his revolver. Late in the afternoon, according to their testimony, he had unsuccessfully attempted to talk the victim into driving him to North Carolina. She did drive the petitioner to a local diner. There the two were observed by several police officers, who testified that both the petitioner and the victim had been drinking. The two were observed by a deputy sheriff as they were preparing to leave the diner in her car. The petitioner was then in possession of his revolver, and the sheriff also observed a kitchen knife in the automobile. The sheriff testified that he had offered to keep the revolver until the petitioner sobered up, but that the latter had indicated that this would be unnecessary since he and the victim were about to engage in sexual activity.

Her body was found in a secluded church parking lot a day and a half later, naked from the waist down, her slacks beneath her body. Uncontradicted medical and expert evidence established that she had been shot twice at close range with the petitioner's gun. She appeared not to have been sexually molested. Six cartridge cases identified as having been fired from the petitioner's gun were found near the body.

After shooting Mrs. Cole, the petitioner drove her car to North Carolina, where, after a short trip to Florida, he was arrested several days later. In a postarrest statement, introduced in evidence by the prosecution, the petitioner admitted that he had shot the victim. He contended, however, that the shooting had been accidental. When asked to describe his condition at the time of the shooting, he indicated that he had not been drunk, but had been "pretty high." His

story was that the victim had attacked him with a knife when he resisted her sexual advances. He said that he had defended himself by firing a number of warning shots into the ground, and had then reloaded his revolver. The victim, he said, then attempted to take the gun from him, and the gun "went off" in the ensuing struggle. He said that he fled without seeking help for the victim because he was afraid. At the trial, his position was that he had acted in self-defense. Alternatively, he claimed that in any event the State's own evidence showed that he had been too intoxicated to form the specific intent necessary under Virginia law to sustain a conviction of murder in the first degree.[2]

The trial judge, declaring himself convinced beyond a reasonable doubt that the petitioner had committed first-degree murder, found him guilty of that offense.[3] The petitioner's motion to set aside the judgment as contrary to the evidence was denied, and he was sentenced to serve a term of 30 years in the Virginia state penitentiary. A petition for writ of error to the Virginia Supreme Court on the ground that the evidence was insufficient to support the conviction was denied.[4]

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[2] Under Virginia law, voluntary intoxication—although not an affirmative defense to second-degree murder—is material to the element of premeditation and may be found to have negated it. *Hatcher* v. *Commonwealth*, 218 Va. 811, 241 S. E. 2d 756.

[3] When trial without a jury is had on a not guilty plea in Virginia, the court is to "have and exercise all the powers, privileges and duties given to juries . . . ." Va. Code § 19.2–257 (1975).

[4] There is no appeal as of right from a criminal conviction in Virginia. *Saunders* v. *Reynolds*, 214 Va. 697, 204 S. E. 2d 421. Each petition for writ of error under Va. Code § 19.2–317 (1975) is reviewed on the merits, however, and the effect of a denial is to affirm the judgment of conviction on the merits. *Saunders* v. *Reynolds*, *supra*.

The petition for writ of error alleged that "the trial Court erred in finding the Petitioner guilty of first-degree murder in light of the evidence introduced on behalf of the Commonwealth, and on unwarranted inferences drawn from this evidence." The petitioner contended that an affirmance would violate the Due Process Clause of the Fourteenth Amendment. In

The petitioner then commenced this habeas corpus proceeding in the United States District Court for the Eastern District of Virginia, raising the same basic claim.[5] Applying the "no evidence" criterion of *Thompson* v. *Louisville*, 362 U. S. 199, the District Court found the record devoid of evidence of premeditation and granted the writ. The Court of Appeals for the Fourth Circuit reversed the judgment.[6] The court noted that a dissent from the denial of certiorari in a case in this Court had exposed the question whether the constitutional rule of *In re Winship*, 397 U. S. 358, might compel a new criterion by which the validity of a state criminal conviction must be tested in a federal habeas corpus proceeding. See *Freeman* v. *Zahradnick*, 429 U. S. 1111 (dissent from denial of certiorari). But the appellate court held that in the absence of further guidance from this Court it would apply the same "no evidence" criterion of *Thompson* v. *Louisville* that the District Court had adopted. The court was of the view that some evidence that the petitioner had intended to kill the victim could be found in the facts that the petitioner had reloaded his gun after firing warning shots, that he had had time to do so, and that the victim was then shot not once but twice. The court also concluded that the state trial judge could have found that the petitioner was not so intoxicated as to be incapable of premeditation.

We granted certiorari to consider the petitioner's claim that under *In re Winship*, *supra*, a federal habeas corpus court must

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its order denying Jackson's petition, the Virginia Supreme Court stated it was "of [the] opinion that there is no reversible error in the judgment complained of . . . ." Virginia law requires sufficiency claims to be raised on direct appeal; such a claim may not be raised in a state habeas corpus proceeding. *Pettus* v. *Peyton*, 207 Va. 906, 153 S. E. 2d 278.

[5] The District Court correctly found that the petitioner had exhausted his state remedies on this issue. See n. 4, *supra*.

[6] The opinions of the District Court and the Court of Appeals are not reported. The Court of Appeals' judgment order is reported at 580 F. 2d 1048.

consider not whether there was *any* evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt. 439 U. S. 1001.

II

Our inquiry in this case is narrow. The petitioner has not seriously questioned any aspect of Virginia law governing the allocation of the burden of production or persuasion in a murder trial. See *Mullaney* v. *Wilbur*, 421 U. S. 684; *Patterson* v. *New York*, 432 U. S. 197. As the record demonstrates, the judge sitting as factfinder in the petitioner's trial was aware that the State bore the burden of establishing the element of premeditation, and stated that he was applying the reasonable-doubt standard in his appraisal of the State's evidence. The petitioner, moreover, does not contest the conclusion of the Court of Appeals that under the "no evidence" rule of *Thompson* v. *Louisville*, *supra*, his conviction of first-degree murder is sustainable. And he has not attacked the sufficiency of the evidence to support a conviction of second-degree murder. His sole constitutional claim, based squarely upon *Winship*, is that the District Court and the Court of Appeals were in error in not recognizing that the question to be decided in this case is whether any rational factfinder could have concluded beyond a reasonable doubt that the killing for which the petitioner was convicted was premeditated. The question thus raised goes to the basic nature of the constitutional right recognized in the *Winship* opinion.

III

A

This is the first of our cases to expressly consider the question whether the due process standard recognized in *Winship* constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion

that every element of the crime has been established beyond a reasonable doubt. Upon examination of the fundamental differences between the constitutional underpinnings of *Thompson* v. *Louisville, supra,* and of *In re Winship, supra,* the answer to that question, we think, is clear.

It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. *Cole* v. *Arkansas,* 333 U. S. 196, 201; *Presnell* v. *Georgia,* 439 U. S. 14. These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. *E. g., Hovey* v. *Elliott,* 167 U. S. 409, 416–420. Cf. *Boddie* v. *Connecticut,* 401 U. S. 371, 377–379. A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused. Accordingly, we held in the *Thompson* case that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. See also *Vachon* v. *New Hampshire,* 414 U. S. 478; *Adderley* v. *Florida,* 385 U. S. 39; *Gregory* v. *Chicago,* 394 U. S. 111; *Douglas* v. *Buder,* 412 U. S. 430. The "no evidence" doctrine of *Thompson* v. *Louisville* thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty.

The Court in *Thompson* explicitly stated that the due process right at issue did not concern a question of evidentiary "sufficiency." 362 U. S., at 199. The right established in *In re Winship,* however, clearly stands on a different footing. *Winship* involved an adjudication of juvenile delinquency made by a judge under a state statute providing that the prosecution must prove the conduct charged as delinquent—which in *Winship* would have been a criminal offense if engaged in by an adult—by a preponderance of the evidence.

Applying that standard, the judge was satisfied that the juvenile was "guilty," but he noted that the result might well have been different under a standard of proof beyond a reasonable doubt. In short, the record in *Winship* was not totally devoid of evidence of guilt.

The constitutional problem addressed in *Winship* was thus distinct from the stark problem of arbitrariness presented in *Thompson* v. *Louisville.* In *Winship,* the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U. S., at 364. In so holding, the Court emphasized that proof beyond a reasonable doubt has traditionally been regarded as the decisive difference between criminal culpability and civil liability. *Id.,* at 358–362. See *Davis* v. *United States,* 160 U. S. 469; *Brinegar* v. *United States,* 338 U. S. 160, 174; *Leland* v. *Oregon,* 343 U. S. 790; 9 J. Wigmore, Evidence § 2495, pp. 307–308 (3d ed. 1940). Cf. *Woodby* v. *INS,* 385 U. S. 276, 285. The standard of proof beyond a reasonable doubt, said the Court, "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U. S., at 363. At the same time, by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. *Id.,* at 372 (Harlan, J., concurring).

The constitutional standard recognized in the *Winship* case was expressly phrased as one that protects an accused against a conviction except on "*proof* beyond a reasonable doubt . . . ." In subsequent cases discussing the reasonable-doubt standard, we have never departed from this definition of the rule or from

the *Winship* understanding of the central purposes it serves. See, *e. g., Ivan V.* v. *City of New York*, 407 U. S. 203, 204; *Lego* v. *Twomey*, 404 U. S. 477, 486–487; *Mullaney* v. *Wilbur*, 421 U. S. 684; *Patterson* v. *New York*, 432 U. S. 197; *Cool* v. *United States*, 409 U. S. 100, 104. In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

B

Although several of our cases have intimated that the fact-finder's application of the reasonable-doubt standard to the evidence may present a federal question when a state conviction is challenged, *Lego* v. *Twomey, supra*, at 487; *Johnson* v. *Louisiana*, 406 U. S. 356, 360, the Federal Courts of Appeals have generally assumed that so long as the reasonable-doubt instruction has been given at trial, the no-evidence doctrine of *Thompson* v. *Louisville* remains the appropriate guide for a federal habeas corpus court to apply in assessing a state prisoner's challenge to his conviction as founded upon insufficient evidence. See, *e. g., Cunha* v. *Brewer*, 511 F. 2d 894 (CA8).[7] We cannot agree.

The *Winship* doctrine requires more than simply a trial

[7] The Court of Appeals in the present case, of course, recognized that *Winship* may have changed the constitutional standard in federal habeas corpus. And the Court of Appeals for the Sixth Circuit recently recognized the possible impact of *Winship* on federal habeas corpus in a case in which it held that "a rational trier of fact could have found the defendant . . . guilty beyond a reasonable doubt." *Spruytte* v. *Koehler*, affirmance order, 590 F. 2d 335. An even more recent case in that court provoked a lively debate among three of its members regarding the effect of *Winship* upon federal habeas corpus. The writ was granted in that case, even though the trial record concededly contained "some evidence" of the applicant's guilt. See *Speigner* v. *Jago*, 603 F. 2d 1208.

ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence.[8] A "reasonable doubt," at a minimum, is one based upon "reason."[9] Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. *Glasser* v. *United States*, 315 U. S. 60, 80; *Bronston* v. *United States*, 409 U. S. 352. See also, *e. g.*, *Curley* v. *United States*, 81 U. S. App. D. C. 389, 392–393, 160 F. 2d 229, 232–233.[10] Under *Winship*, which established

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[8] The trier of fact in this case was a judge and not a jury. But this is of no constitutional significance. The record makes clear that the judge deemed himself "properly instructed."

[9] A "reasonable doubt" has often been described as one "based on reason which arises from the evidence or lack of evidence." *Johnson* v. *Louisiana*, 406 U. S. 356, 360 (citing cases). For a discussion of variations in the definition used in jury instructions, see *Holland* v. *United States*, 348 U. S. 121, 140 (rejecting contention that circumstantial evidence must exclude every hypothesis but that of guilt).

[10] This, of course, does not mean that convictions are frequently reversed upon this ground. The practice in the federal courts of entertaining properly preserved challenges to evidentiary sufficiency, see Fed. Rule Crim. Proc. 29, serves only to highlight the traditional understanding in our system that the application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion. To be sure, the factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of "not guilty." This is the logical corollary of the rule that there can be no appeal from a judgment of acquittal, even if the evidence of guilt is overwhelming. The power of the factfinder to err upon the side of mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty. *Carpenters & Joiners* v. *United States*, 330 U. S. 395, 408. Cf. *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13–14. Any such premise is wholly belied by the settled practice of testing evidentiary sufficiency through a motion for judgment of acquittal and a postverdict appeal from the denial

proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.

A federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court. For example, on direct review of a state-court conviction, where the claim is made that an involuntary confession was used against the defendant, this Court reviews the facts to determine whether the confession was wrongly admitted in evidence. *Blackburn* v. *Alabama*, 361 U. S. 199, 205–210. Cf. *Drope* v. *Missouri*, 420 U. S. 162, 174–175, and n. 10. The same duty obtains in federal habeas corpus proceedings. See *Townsend* v. *Sain*, 372 U. S. 293, 318; *Brown* v. *Allen*, 344 U. S. 443, 506–507 (opinion of Frankfurter, J.).

After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.[11] But this inquiry does not require a court to "ask

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of such a motion. See generally 4 L. Orfield, Criminal Procedure Under the Federal Rules §§ 29:1–29:29 (1967 and Supp. 1978).

[11] Until 1972, the Court of Appeals for the Second Circuit took the position advanced today by the opinion concurring in the judgment that the beyond-a-reasonable-doubt standard is merely descriptive of the state of mind required of the factfinder in a criminal case and not of the actual quantum and quality of proof necessary to support a criminal conviction. Thus, that court held that in a jury trial the judge need not distinguish between criminal and civil cases for the purpose of ruling on a motion for judgment of acquittal. *United States* v. *Feinberg*, 140 F. 2d 592, 594. In *United States* v. *Taylor*, 464 F. 2d 240 (CA2), *Feinberg* was overruled, partly on the strength of *Winship*. The *Taylor* court adopted the directed-verdict criterion articulated in *Curley* v. *United States*, 81 U. S. App. D. C. 389, 392–393, 160 F. 2d 229, 232–233 (If "reasonable" jurors "must necessarily have . . . a reasonable doubt" as to guilt, the judge "must require acquittal, because no other result is permissible within the

itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby* v. *INS*, 385 U. S., at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana*, 406 U. S., at 362. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.[12] The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.[13]

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fixed bounds of jury consideration"). This is now the prevailing criterion for judging motions for acquittal in federal criminal trials. See generally 2 C. Wright, Federal Practice and Procedure § 467 (1969 and Supp. 1978).

[12] Contrary to the suggestion in the opinion concurring in the judgment, the criterion announced today as the constitutional minimum required to enforce the due process right established in *Winship* is not novel. See, *e. g.*, *United States* v. *Amato*, 495 F. 2d 545, 549 (CA5) ("whether, taking the view [of the evidence] most favorable to the Government, a *reasonably-minded jury* could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt") (emphasis added); *United States* v. *Jorgenson*, 451 F. 2d 516, 521 (CA10) (whether, "considering the evidence in the light most favorable to the government, there is substantial evidence from which a jury might *reasonably find* that an accused is guilty beyond a reasonable doubt") (emphasis added). *Glasser* v. *United States*, 315 U. S. 60, 80, has universally been understood as a case applying this criterion. See, *e. g.*, *Harding* v. *United States*, 337 F. 2d 254, 256 (CA8). See generally 4 Orfield, *supra* n. 10, § 29.28.

[13] The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict

That the *Thompson* "no evidence" rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. "[A] mere modicum of evidence may satisfy a 'no evidence' standard . . . ." *Jacobellis* v. *Ohio*, 378 U. S. 184, 202 (Warren, C. J., dissenting). Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401—could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. The *Thompson* doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of *Winship* has been honored.[14]

C

Under 28 U. S. C. § 2254, a federal court must entertain a claim by a state prisoner that he or she is being held in "custody in violation of the Constitution or laws or treaties of the

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was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known. See generally 3 F. Wharton, Criminal Procedure § 520 (12th ed. 1975 and Supp. 1978).

[14] Application of the *Thompson* standard to assess the validity of a criminal conviction after *Winship* could lead to absurdly unjust results. Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error. See *Cool* v. *United States*, 409 U. S. 100. Cf. *Taylor* v. *Kentucky*, 436 U. S. 478. Thus, a defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence. Yet a defendant against whom there was but one slender bit of evidence would not be denied due process so long as the jury has been properly instructed on the prosecution's burden of proof beyond a reasonable doubt. Such results would be wholly faithless to the constitutional rationale of *Winship*.

United States." Under the *Winship* decision, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim. Thus, assuming that state remedies have been exhausted, see 28 U. S. C. § 2254 (b), and that no independent and adequate state ground stands as a bar, see *Estelle* v. *Williams*, 425 U. S. 501; *Francis* v. *Henderson*, 425 U. S. 536; *Wainwright* v. *Sykes*, 433 U. S. 72; *Fay* v. *Noia*, 372 U. S. 391, 438, it follows that such a claim is cognizable in a federal habeas corpus proceeding. The respondents have argued, nonetheless, that a challenge to the constitutional sufficiency of the evidence should not be entertained by a federal district court under 28 U. S. C. § 2254.

In addition to the argument that a *Winship* standard invites replication of state criminal trials in the guise of § 2254 proceedings—an argument that simply fails to recognize that courts can and regularly do gauge the sufficiency of the evidence without intruding into any legitimate domain of the trier of fact—the respondents have urged that any departure from the *Thompson* test in federal habeas corpus proceedings will expand the number of meritless claims brought to the federal courts, will duplicate the work of the state appellate courts, will disserve the societal interest in the finality of state criminal proceedings, and will increase friction between the federal and state judiciaries. In sum, counsel for the State urges that this type of constitutional claim should be deemed to fall within the limit on federal habeas corpus jurisdiction identified in *Stone* v. *Powell*, 428 U. S. 465, with respect to Fourth Amendment claims. We disagree.

First, the burden that is likely to follow from acceptance of the *Winship* standard has, we think, been exaggerated. Federal-court challenges to the evidentiary support for state convictions have since *Thompson* been dealt with under § 2254. *E. g.*, *Freeman* v. *Stone*, 444 F. 2d 113 (CA9); *Grieco* v.

Meachum, 533 F. 2d 713 (CA1); *Williams* v. *Peyton*, 414 F. 2d 776 (CA4). A more stringent standard will expand the contours of this type of claim, but will not create an entirely new class of cases cognizable on federal habeas corpus. Furthermore, most meritorious challenges to constitutional sufficiency of the evidence undoubtedly will be recognized in the state courts, and, if the state courts have fully considered the issue of sufficiency, the task of a federal habeas court should not be difficult. Cf. *Brown* v. *Allen*, 344 U. S., at 463.[15] And this type of claim can almost always be judged on the written record without need for an evidentiary hearing in the federal court.

Second, the problems of finality and federal-state comity arise whenever a state prisoner invokes the jurisdiction of a federal court to redress an alleged constitutional violation. A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim. Although state appellate review undoubtedly will serve in the vast majority of cases to vindicate the due process protection that follows from *Winship*, the same could also be said of the vast majority of other federal constitutional rights that may be implicated in a state criminal trial. It is the occasional abuse that the federal writ of habeas corpus stands ready to correct. *Brown* v. *Allen*, *supra*, at 498–501 (opinion of Frankfurter, J.).

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[15] The Virginia Supreme Court's order denying Jackson's petition for writ of error does not make clear what criterion was applied to the petitioner's claim that the evidence in support of his first-degree murder conviction was insufficient. See n. 4, *supra*. At oral argument, counsel for the petitioner contended that the Virginia sufficiency standard is not keyed to *Winship*. Counsel for the State disagreed. Under these circumstances, we decline to speculate as to the criterion that the state court applied. The fact that a state appellate court invoked the proper standard, however, although entitled to great weight, does not totally bar a properly presented claim of this type under § 2254.

The respondents have argued nonetheless that whenever a person convicted in a state court has been given a "full and fair hearing" in the state system—meaning in this instance state appellate review of the sufficiency of the evidence—further federal inquiry—apart from the possibility of discretionary review by this Court—should be foreclosed. This argument would prove far too much. A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction. But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state postconviction remedies to redress possible error. See 28 U. S. C. §§ 2254 (b), (d). What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur—reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right—is not one that can be so lightly abjured.

The constitutional issue presented in this case is far different from the kind of issue that was the subject of the Court's decision in *Stone* v. *Powell, supra*. The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. *E. g., Mullaney* v. *Wilbur*, 421 U. S., at 697–698 (requirement of proof beyond a reasonable doubt is not "limit[ed] to those facts which, if not proved, would wholly exonerate" the accused). Under our system of criminal justice even a thief

is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.

We hold that in a challenge to a state criminal conviction brought under 28 U. S. C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.[16]

IV

Turning finally to the specific facts of this case, we reject the petitioner's claim that under the constitutional standard dictated by *Winship* his conviction of first-degree murder cannot stand. A review of the record in the light most favorable to the prosecution convinces us that a rational factfinder could readily have found the petitioner guilty beyond a reasonable doubt of first-degree murder under Virginia law.

There was no question at the trial that the petitioner had fatally shot Mary Cole. The crucial factual dispute went to the sufficiency of the evidence to support a finding that he had specifically intended to kill her. This question, as the Court of Appeals recognized, must be gauged in the light of applicable Virginia law defining the element of premeditation. Under that law it is well settled that premeditation need not exist for any particular length of time, and that an intent to kill may be formed at the moment of the commission of the unlawful act. *Commonwealth* v. *Brown*, 90 Va. 671, 19 S. E. 447. From the circumstantial evidence in the record, it is

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[16] The respondents have suggested that this constitutional standard will invite intrusions upon the power of the States to define criminal offenses. Quite to the contrary, the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. Whether the State could constitutionally make the conduct at issue criminal at all is, of course, a distinct question. See *Papachristou* v. *Jacksonville*, 405 U. S. 156; *Robinson* v. *California*, 370 U. S. 660.

clear that the trial judge could reasonably have found beyond a reasonable doubt that the petitioner did possess the necessary intent at or before the time of the killing.

The prosecution's uncontradicted evidence established that the petitioner shot the victim not once but twice. The petitioner himself admitted that the fatal shooting had occurred only after he had first fired several shots into the ground and then reloaded his gun. The evidence was clear that the two shots that killed the victim were fired at close, and thus predictably fatal, range by a person who was experienced in the use of the murder weapon. Immediately after the shooting, the petitioner drove without mishap from Virginia to North Carolina, a fact quite at odds with his story of extreme intoxication. Shortly before the fatal episode, he had publicly expressed an intention to have sexual relations with the victim. Her body was found partially unclothed. From these uncontradicted circumstances, a rational factfinder readily could have inferred beyond a reasonable doubt that the petitioner, notwithstanding evidence that he had been drinking on the day of the killing, did have the capacity to form and had in fact formed an intent to kill the victim.

The petitioner's calculated behavior both before and after the killing demonstrated that he was fully capable of committing premeditated murder. His claim of self-defense would have required the trial judge to draw a series of improbable inferences from the basic facts, prime among them the inference that he was wholly uninterested in sexual activity with the victim but that she was so interested as to have willingly removed part of her clothing and then attacked him with a knife when he resisted her advances, even though he was armed with a loaded revolver that he had just demonstrated he knew how to use. It is evident from the record that the trial judge found this story, including the petitioner's belated contention that he had been so intoxicated as to be incapable of premeditation, incredible.

Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past. *Holland* v. *United States*, 348 U. S. 121, 140. We decline to adopt it today. Under the standard established in this opinion as necessary to preserve the due process protection recognized in *Winship*, a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. Applying these criteria, we hold that a rational trier of fact could reasonably have found that the petitioner committed murder in the first degree under Virginia law.

For these reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

The Constitution prohibits the criminal conviction of any person except upon proof *sufficient to convince the trier of fact* of guilt beyond a reasonable doubt. Cf. *ante*, at 309. This rule has prevailed in our courts "at least from our early years as a Nation." *In re Winship*, 397 U. S. 358, 361.

Today the Court creates a new rule of law—one that has never prevailed in our jurisprudence. According to the Court, the Constitution now prohibits the criminal conviction of any person—including, apparently, a person against whom the facts have already been found beyond a reasonable doubt by a jury, a trial judge, and one or more levels of state appellate judges—except upon proof sufficient to convince a *federal*

judge that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ante,* at 319.

The adoption of this novel constitutional rule is not necessary to the decision of this case. Moreover, I believe it is an unwise act of lawmaking. Despite its chimerical appeal as a new counterpart to the venerable principle recognized in *Winship,* I am persuaded that its precipitous adoption will adversely affect the quality of justice administered by federal judges. For that reason I shall analyze this new brainchild with some care.

I shall begin by explaining why neither the record in this case, nor general experience with challenges to the sufficiency of the evidence supporting criminal convictions, supports, much less compels, the conclusion that there is *any* need for this new constitutional precept. I shall next show that it is not logically compelled by either the holding or the analysis in *In re Winship, supra.* Finally, I shall try to demonstrate why the Court's new rule—if it is not just a meaningless shibboleth—threatens serious harm to the quality of our judicial system.

I

It is, of course, part of this Court's tradition that new rules of law emerge from the process of case-by-case adjudication of constitutional issues. Widespread concern that existing constitutional doctrine is unjust often provides the occasion, and is sometimes even relied upon as a justification, for the exercise of such lawmaking authority by the Court. Without entering the debate over the legitimacy of this justification for judicial action, it is at least certain that it should not be the basis for dramatic—indeed, for *any*—constitutional lawmaking efforts unless (1) those efforts are necessary to the decision of the case at hand and (2) powerful reasons favor a change in the law. See *Ashwander* v. *TVA,* 297 U. S. 288, 345–348 (Brandeis, J., concurring).

In this case, the Court's analysis fails on both counts. It has accordingly formulated a new constitutional principle under the most dangerous possible circumstances—*i. e.*, where the exercise of judicial authority is neither necessitated nor capable of being limited by "the precise facts to which [the rule is originally] to be applied," *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Comm'rs*, 113 U. S. 33, 39, nor even by some broader set of identifiable experiences with the evil supposedly involved.

Most significantly, the Court has announced its new constitutional edict in a case in which it has absolutely no bearing on the outcome. The only factual issue at stake is whether petitioner intended to kill his victim. If the evidence is viewed "in the light most favorable to the prosecution," *ante*, at 319—and, indeed, we may view it through the eyes of the actual factfinder, whose observations about the evidence are recorded in the trial transcript—there can be only one answer to that question no matter *what* standard of appellate review is applied. In Part IV of its opinion, the Court accepts this conclusion. There is, therefore, no need to fashion a broad new rule of constitutional law to dispose of this squalid but rather routine murder case. Under any view, the evidence is sufficient.

The Court's new rule is adopted simply to forestall some hypothetical evil that has not been demonstrated, and in my view is not fairly demonstrable. Although the Judiciary has received its share of criticism—principally because of the delays and costs associated with litigation—I am aware of no general dissatisfaction with the accuracy of the factfinding process or the adequacy of the rules applied by state appellate courts when reviewing claims of insufficiency.

What little evidence the Court marshals in favor of a contrary conclusion is unconvincing. See *ante*, at 317–318, n. 10. The Court is simply incorrect in implying that there are a significant number of occasions when federal convictions are

overturned on appeal because no rational trier of fact could have found guilt beyond a reasonable doubt. The two opinions of this Court cited *ante*, at 317, stand for no such proposition. In neither was a conviction reversed for insufficiency. See *Glasser* v. *United States*, 315 U. S. 60; *Bronston* v. *United States*, 409 U. S. 352.

Moreover, a study of the 127 federal criminal convictions that were reviewed by the various Courts of Appeals and reported in the most recent hardbound volume of the Federal Reporter, Second Series, Volume 589, reveals that only 3 were overturned on sufficiency grounds. And of those, one was overturned under a "no evidence" standard, while the other two, in which a total of only 3 out of 36 counts were actually reversed, arguably involved legal issues masquerading as sufficiency questions.[1] It is difficult to believe that the federal courts will turn up more sufficiency problems than this on habeas review when, instead of acting as the first level of

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[1] In *United States* v. *Tarr*, 589 F. 2d 55 (CA1 1978), the court overturned one of two counts of which appellant was convicted because there was insufficient evidence to prove that he had the intent to aid and abet the unauthorized transfer of a machinegun in violation of 26 U. S. C. § 5861 (e) and 18 U. S. C. § 2. The court found "no evidence" that appellant had the requisite knowledge. 589 F. 2d, at 60.

In *United States* v. *Whetzel*, 191 U. S. App. D. C. 184, 589 F. 2d 707 (1978), the court overturned 2 of the 35 counts of appellant's conviction because "the Government failed to offer proof that would permit a jury to reasonably infer that the merchandise [appellant] transported had a value of $5,000." *Id.*, at 188, 589 F. 2d, at 711. However, the basis for this determination was that the Government's valuation method, which the trial court allowed the jury to consider, was legally erroneous. Similiarly, in *United States* v. *Fearn*, 589 F. 2d 1316 (CA7 1978), the court overturned the conviction based on a federal nonconstitutional rule, which surely would not apply in habeas review of state convictions, "that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused." *Id.*, at 1321. The court did not independently analyze whether the uncorroborated confession involved in that case could itself have allowed a rational trier of fact to find guilt beyond a reasonable doubt.

review, as in the cases studied, they will be acting as the second, third, or even fourth level of appellate review. In short, there is simply no reason to tinker with an elaborate mechanism that is now functioning well.

II

There is nothing in the facts of this case or, so far as the Court has demonstrated, in those of cases like it to warrant today's excursion into constitutional rulemaking. The Court instead portrays its rule as the logical corollary of the principle recognized in *Winship* regarding the subjective state of mind that persons charged with the responsibility of evaluating the credibility of evidence must possess before they find the defendant guilty in a criminal case. But an examination of *Winship* reveals that it has nothing to do with appellate, much less habeas corpus, review standards; that the reasoning used in that case to reach its conclusion with respect to the trier of fact does not support, and indeed counsels against, the Court's conclusion with respect to federal habeas judges; and that there is no necessary connection between the rule recognized in *Winship* and the rule invented by the Court today.

In distinct contrast to the circumstances of this case, the facts of *Winship* presented "a case where the choice of the standard of proof has made a difference: the [trial] judge below forthrightly acknowledged that he believed by a preponderance of the evidence [in], but was not convinced beyond a reasonable doubt" of, the juvenile's guilt. 397 U. S., at 369 (Harlan, J., concurring). Because the trier of fact entertained such a doubt, this Court held that the juvenile was constitutionally entitled to the same verdict that an adult defendant in a criminal case would receive. In so holding, the Court merely extended to juveniles a protection that had traditionally been available to defendants in criminal *trials* in this Nation. *Id.*, at 361.

But nothing in the *Winship* opinion suggests that it also

bore on appellate or habeas corpus procedures. Although it repeatedly emphasized the function of the reasonable-doubt standard as describing the requisite "subjective state of certitude" of the *"factfinder,"* [2] it never mentioned the question of how appellate judges are to know whether the trier of fact really was convinced beyond a reasonable doubt, or, indeed, whether the factfinder was a "rational" person or group of persons.

Moreover, the mode of analysis employed in *Winship* finds no counterpart in the Court's opinion in this case. For example, in *Winship*, the Court pointed out the breadth of both the historical and the current acceptance of the reasonable-doubt *trial* standard.[3] In this case, by contrast, the Court

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[2] In *In re Winship*, 397 U. S., at 364, the Court stated: "As we said in *Speiser* v. *Randall*, [357 U. S. 513,] 525–526: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . *persuading the factfinder* at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . *convincing the factfinder* of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it *'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'* Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No. 4, pp. 1, 26 (1967)." (Emphasis added.)

Later on the same page, the Court added:

"It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense *without convincing a proper factfinder of his guilt with utmost certainty.*" *Ibid.* (emphasis added).

See also *id.*, at 370 (Harlan, J., concurring) ("[A] standard of proof represents an attempt to instruct *the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions* for a particular type of adjudication") (emphasis added).

[3] The Court, relying on treatises that analyzed the law in all 50 States as well as in the federal system, determined both that the reasonable-doubt

candidly recognizes that the Federal Courts of Appeals have "generally" *rejected* the habeas standard that it adopts today. *Ante*, at 316.[4]

The *Winship* court relied on nine prior opinions of this Court that bore directly on the issue presented. 397 U. S., at 362. Here, the Court purportedly relies on two prior decisions, but as is pointed out, *supra*, at 329, neither of these cases itself applied a "reasonable doubt" appellate standard to overturn a conviction, neither purported to be interpreting the Constitution, and neither expressed any view whatsoever on the appropriate standard in collateral proceedings such as are involved in this case.[5] As the Court itself notes, we have instead repeatedly endorsed the "no evidence" test, and have continued to do so after *Winship* was decided. *Vachon* v.

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standard has prevailed at the *trial* level "at least from our early years as a Nation" and that it "is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the *trier* of all the essential elements of guilt." *Id.*, at 361 (emphasis added). See also *id.*, at 372 (Harlan, J., concurring) ("It is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal *trials* that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation") (emphasis added).

[4] The Court has undertaken no systematic analysis of the standards for reviewing the sufficiency of the evidence that prevail either in state habeas corpus and other collateral proceedings or in state appellate courts. What sources I have discovered suggest that "varied standards" are in use and that each is "subject to shifting and elastic definitions." Winningham, The Dilemma of the Directed Acquittal, 15 Vand. L. Rev. 699, 705–706 (1962). See ALI Code of Criminal Procedure, Commentary on § 321, pp. 961–962 (1930); Rules of Criminal Procedure 481 (c), 522 (a) and commentary, 10 U. L. A. (1974).

[5] It hardly bears repeating that habeas corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials. See generally *Stone* v. *Powell*, 428 U. S. 465. Instead, it is designed to guard against extreme malfunctions in the state criminal justice systems.

New Hampshire, 414 U. S. 478; *Douglas* v. *Buder*, 412 U. S. 430; *Gregory* v. *Chicago*, 394 U. S. 111; *Adderley* v. *Florida*, 385 U. S. 39; *Thompson* v. *Louisville*, 362 U. S. 199. See also *Clyatt* v. *United States*, 197 U. S. 207, 222.

The primary reasoning of the Court in *Winship* is also inapplicable here. The Court noted in that case that the reasonable-doubt standard has the desirable effect of significantly reducing the risk of an inaccurate factfinding and thus of erroneous convictions, as well as of instilling confidence in the criminal justice system. 397 U. S., at 363–364. See also *id.*, at 370–372 (Harlan, J., concurring). In this case, however, it would be impossible (and the Court does not even try) to demonstrate that there is an appreciable risk that a factfinding made by a jury beyond a reasonable doubt, and twice reviewed by a trial judge in ruling on directed verdict and post-trial acquittal motions and by one or more levels of appellate courts on direct appeal, as well as by two federal habeas courts under the *Thompson* "no evidence" rule, is likely to be erroneous.[6] Indeed, the very premise of *Winship* is that properly selected judges and properly instructed juries act rationally, that the former will tell the truth when they declare that they are convinced beyond a reasonable doubt and the latter will conscientiously obey and understand the reasonable-doubt instructions they receive before retiring to reach a verdict, and therefore that either factfinder will itself provide the necessary bulwark against erroneous factual determinations. To presume otherwise is to make light of *Winship*.[7]

[6] As I discuss earlier, see *supra*, at 329, the incidence of factual error at the trial level in federal courts appears to be exceedingly low, even when measured by the relatively strict appellate standard used by the Federal Courts of Appeals. Presumably the incidence of errors that survive that first level of review is even smaller.

[7] Indeed, the Court makes light of *Winship* by suggesting that, in the absence of its new habeas procedure, the result of that case is simply "a trial ritual." *Ante*, at 316–317. Far more likely in my view is that the

Having failed to identify the evil against which the rule is directed, and having failed to demonstrate how it follows from the analysis typically used in due process cases of this character, the Court places all of its reliance on a dry, and in my view incorrect, syllogism: If *Winship* requires the factfinder to apply a reasonable-doubt standard, then logic requires a reviewing judge to apply a like standard

But, taken to its ultimate conclusion, this "logic" would require the reviewing court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby* v. *INS*, 385 U. S. 276, 282 (emphasis added). The Court, however, rejects this standard, as well as others that might be considered consistent with *Winship*. For example, it does not require the reviewing court to view just the evidence most favorable to the prosecution and then to decide whether that evidence convinced it beyond a reasonable doubt, nor whether, based on the entire record, rational triers of fact could be convinced of guilt beyond a reasonable doubt. Instead, and without explanation, it chooses a still narrower standard that merely asks whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ante*, at 319.[8] It seems to me that if "logic" allows

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Court's difficult-to-apply but largely unnecessary rule will itself result in a "collateral-attack ritual" that will undermine the integrity of both the state and federal judiciaries. See *infra*, at 336–339.

[8] So far as I can determine, this standard first appeared in our jurisprudence in MR. JUSTICE STEWART's opinion dissenting from the Court's denial of certiorari in *Freeman* v. *Zahradnick*, 429 U. S. 1111, 1112, 1113, 1114, 1116. At that time, it gave the impression of being somewhat narrower than—if only because it was stated quite differently from—the test used by the Courts of Appeals in reviewing federal convictions on direct appeal. See *Curley* v. *United States*, 81 U. S. App. D. C. 389, 392–393, 160 F. 2d 229, 232–233 (1947). Although the Court twice repeats the *Freeman* test, see *ante*, at 313, 319, it now appears either to equate that standard with the—in my view—broader federal direct-review standard,

this choice after *Winship* it should also allow the presumption that the Court has rejected—that trial judges and juries will act rationally and honestly in applying the reasonable-doubt standard, at least so long as the trial is free of procedural error and the record contains evidence tending to prove each of the elements of the offense.

Time may prove that the rule the Court has adopted today is the wisest compromise between one extreme that maximizes the protection against the risk that innocent persons will be erroneously convicted and the other extreme that places the greatest faith in the ability of fair procedures to produce just verdicts. But the Court's opinion should not obscure the fact that its new rule is not logically compelled by the analysis or the holding in *Winship* or in any other precedent, or the fact that the rule reflects a new policy choice rather than the application of a pre-existing rule of law.

III

The Court cautions against exaggerating the significance of its new rule. *Ante,* at 321. It is true that in practice there may be little or no difference between a record that does not contain at least some evidence tending to prove every element of an offense and a record containing so little evidence that no rational factfinder could be persuaded of guilt beyond a reasonable doubt. Moreover, I think the Court is quite correct when it acknowledges that "most meritorious challenges to constitutional sufficiency of the evidence undoubtedly will be recognized in the state courts." *Ante,* at 322. But this only means that the new rule will seldom, if ever, provide a convicted state prisoner with any tangible benefits. It does not mean that the rule will have no impact on the administration of justice. On the contrary, I am persuaded that it will be seriously harmful both to the state and federal judiciaries.

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or to endorse both standards despite their differences. See *ante,* at 318, and nn. 11, 12.

The Court indicates that the new standard to be applied by federal judges in habeas corpus proceedings may be substantially the same as the standard most state reviewing courts are already applying. *Ante*, at 322. The federal district courts are therefore being directed simply to duplicate the reviewing function that is now being performed adequately by state appellate courts. In my view, this task may well be inconsistent with the prohibition—added by Congress to the federal habeas statute in order to forestall undue federal interference with state proceedings, see *Wainwright* v. *Sykes*, 433 U. S. 72, 80—against overturning "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction." 28 U. S. C. § 2254 (d). See *LaVallee* v. *Delle Rose*, 410 U. S. 690. In any case, to assign a single federal district judge the responsibility of directly reviewing, and inevitably supervising, the most routine work of the highest courts of a State can only undermine the morale and the esteem of the state judiciary—particularly when the stated purpose of the additional layer of review is to determine whether the State's factfinder is "rational." [9] Such consequences are intangible but nonetheless significant.

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[9] In the past, collateral review of state proceedings has been justified largely on the grounds (1) that federal judges have special expertise in the federal issues that regularly arise in habeas corpus proceeding, and (2) that they are less susceptible than state judges to political pressures against applying constitutional rules to overturn convictions. See, *e. g.*, Bartels, Avoiding a Comity of Errors, 29 Stan. L. Rev. 27, 30 n. 9 (1976). Cf. *Steffel* v. *Thompson*, 415 U. S. 452, 464; *Mitchum* v. *Foster*, 407 U. S. 225, 242. But neither of these justifications has any force in the present context. State judges are more familiar with the elements of state offenses than are federal judges and should be better able to evaluate sufficiency claims. Moreover, of all decisions overturning convictions, the least likely to be unpopular and thus to distort state decisionmaking processes are ones based on the inadequacy of the evidence. Indeed, once federal courts were divested of authority to second-guess state courts on Fourth Amendment issues, which are far more likely to generate politically motivated

The potential effect on federal judges is even more serious. Their burdens are already so heavy that they are delegating to staff assistants more and more work that we once expected judges to perform.[10] The new standard will invite an unknown number of state prisoners to make sufficiency challenges that they would not have made under the old rule. Moreover, because the "rational trier of fact" must certainly base its decisions on *all* of the evidence, the Court's broader standard may well require that the entire transcript of the state trial be read whenever the factfinders' rationality is challenged under the Court's rule.[11] Because this task will confront the courts of appeals as well as district courts, it will surely impose countless additional hours of unproductive labor on federal judges and their assistants.[12] The increasing vol-

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state-court decisions, see *Stone* v. *Powell*, 428 U. S. 465, a like result in this case would seem to be *a fortiori*.

[10] For example, the heavy federal workload has required the 13 regular and 7 senior judges on the Ninth Circuit to hire 30 staff attorneys and 33 law clerks to assist them in their labors.

[11] Additional burdens will also be imposed if the Court's rule is extended to federal habeas proceedings reviewing federal criminal trials, as well as to ones reviewing state civil commitment proceedings in which we have recently required at least the "clear and convincing" test to be applied as a matter of federal constitutional law. *Addington* v. *Texas*, 441 U. S. 418.

This Court's workload will also increase, of course, when its certiorari docket expands to accommodate the challenges generated by the Court's new rule. The effect will be even greater if the Court's opinion is read to require state appellate courts to apply the reasonable-doubt test on direct review and to require this Court to apply it when reviewing the decisions of those courts on certiorari.

[12] Professor Bator has persuasively explained how the law of diminishing returns inevitably makes it unwise to have duplicative review processes on the "merits" in criminal cases:

"[*I*]*f* a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competences to determine legality. But, it may be asked, why should we seek a point at which such a judgment becomes final? Conceding that no process can assure ultimate truth, will not repetition of inquiry stand a better chance of approximat-

ume of work of this character has already led some of our most distinguished lawyers to discontinue or reject service on the federal bench.[13] The addition of a significant volume

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ing it? In view of the awesomeness of the consequences of conviction, shouldn't we allow redetermination of the merits in an *attempt* to make sure that no error has occurred?

"Surely the answer runs, in the first place, in terms of conservation of resources—and I mean not only simple economic resources, but all of the intellectual, moral, and political resources involved in the legal system. The presumption must be, it seems to me, that if a job can be well done once, it should not be done twice. If one set of institutions is as capable of performing the task at hand as another, we should not ask both to do it. The challenge really runs the other way: if a proceeding is held to determine the facts and law in a case, and the processes used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding 'count'? Why should we duplicate effort? After all, it is the very purpose of the first go-around to decide the case. Neither it nor any subsequent go-around can assure ultimate truth. If, then, the previous determination is to be ignored, we must have some reasoned institutional justification why this should be so.

"Mere iteration of process can do other kinds of damage. I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else. Of course this does not mean that we should not have appeals. As we shall see, important functional and ethical purposes are served by allowing recourse to an appellate court in a unitary system, and to a federal supreme court in a federal system. The acute question is the effect it will have on a trial judge if we then allow still further recourse where these purposes may no longer be relevant. What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the 'truth.'" Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 450–451 (1963).

See also F. James, Civil Procedure 518 (1965).

[13] The testimony of Griffin Bell at his confirmation hearings for Attorney General is particularly relevant. When asked by Senator Scott of Vir-

of pointless labor can only impair the quality of justice administered by federal judges and thereby undermine "the respect and confidence of the community in applications of the . . . law." *In re Winship*, 397 U. S., at 364.

For these reasons, I am unable to join the Court's gratuitous directive to our colleagues on the federal bench.

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ginia why he had earlier resigned from his seat on the Court of Appeals for the Fifth Circuit, Judge Bell responded:

"I found it not to be a rewarding experience any longer. Whether it was because there was no more excitement after the 1960's, or whether it was because the case load changed, but the work load was oppressive. I would not have minded the work load, but the character of the cases changed. It was almost like serving on a criminal court. I did not want to do that any longer." Hearings on the Prospective Nomination of Griffin B. Bell, of Georgia, to be Attorney General, before the Senate Committee on the Judiciary, 95th Cong., 1st Sess., 27 (1977).

FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM *v.* MERRILL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1387. Argued December 6, 1978—Decided June 28, 1979

This case presents the question whether the Freedom of Information Act (FOIA) is violated by petitioner's practice, authorized by regulation, 12 CFR § 271.5 (1978), of withholding certain monetary policy directives from the public during the month they are in effect, such directives being published in full in the Federal Register at the end of the month. To implement its authority to conduct open market operations of the Federal Reserve System, petitioner has established a combined investment pool for all Federal Reserve banks, administered by the Account Manager. Petitioner meets approximately once a month to review the overall state of the economy and consider the appropriate course of monetary and open market policy. Its principal conclusions are embodied in a "Domestic Policy Directive," which indicates in general terms whether petitioner wishes to follow an expansionary, deflationary, or unchanged monetary policy in the period ahead, and which includes specific tolerance ranges for the growth in the money supply and for the federal funds rate. The Account Manager is guided by the Domestic Policy Directive in his transactions with dealers who trade in Government securities. A Domestic Policy Directive exists as a document for approximately one month before it appears in the Federal Register, by which time it has been supplanted by a new Directive. Respondent, who had been denied immediate access under the FOIA to certain records of petitioner's policy actions, instituted suit for declaratory and injunctive relief against the operation of 12 CFR § 271.5 and the policy of delayed disclosure. Without expressly considering petitioner's contention that immediate disclosure of Domestic Policy Directives and tolerance ranges would interfere with the conduct of national monetary policy, the District Court entered judgment for respondent, holding, *inter alia*, that the Directives were "statements of general policy" which, under the FOIA, had to be "currently" published in the Federal Register; that the 1-month delay failed to satisfy the current publication requirement; and that the Directives could not be withheld under Exemption 5 of the FOIA, which applies to documents that are "interagency or intra-agency memorandums or letters which would not be

available by law to a party . . . in litigation with the agency." The Court of Appeals affirmed, also expressing no opinion about petitioner's assertion that immediate disclosure of Domestic Policy Directives and tolerance ranges would seriously interfere with the conduct of national monetary policy.

Held:

1. Petitioner's Domestic Policy Directives are "intra-agency memorandums" within the meaning of Exemption 5 of the FOIA. Petitioner is clearly an "agency" as that term is defined in the Administrative Procedure Act, and the Directives are essentially petitioner's written instructions to the Account Manager, a subordinate official of the agency. The instructions are binding only upon the Account Manager, and neither establish rules that govern the adjudication of individual rights nor require particular conduct or forbearance by any member of the public. Pp. 352–353.

2. Although Exemption 5 does not confer general authority upon an agency, without regard to any privilege enjoyed by the Government in the civil discovery context, to delay disclosure of intra-agency memorandums that would undermine the effectiveness of the agency's policy if released immediately, nevertheless Exemption 5 does incorporate a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract. See Fed. Rule Civ. Proc. 26 (c)(7). Pp. 353–360.

3. Although petitioner's Domestic Policy Directives can fairly be described as containing confidential commercial information generated in the process of awarding a contract, it does not necessarily follow that they would be protected against immediate disclosure in the civil discovery process. If the Directives contain sensitive information not otherwise available, and if immediate release of the Directives would significantly harm the Government's monetary functions or commercial interests, then a slight delay in the publication of the Directives, such as that authorized by 12 CFR § 271.5, would be permitted under Exemption 5. Determination of whether, or to what extent, the Directives would in fact be afforded protection in civil discovery must await the development of a proper record on remand. If the District Court concludes that the Directives would be afforded protection, then it should also consider whether the operative portions of the Directives can feasibly be segregated from the purely descriptive materials therein, and the latter made subject to disclosure or publication without delay. See *EPA* v. *Mink*, 410 U. S. 73, 91. Pp. 361–364.

184 U. S. App. D. C. 203, 565 F. 2d 778, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which STEWART, J., joined in part, *post*, p. 364.

Kenneth S. Geller argued the cause for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock, Leonard Schaitman,* and *Thomas G. Wilson.*

Victor H. Kramer argued the cause for respondent. With him on the brief was *Douglas L. Parker.**

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Federal Open Market Committee has a practice, authorized by regulation, 12 CFR § 271.5 (1978),[1] of withholding

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**Diane B. Cohn* and *Girardeau A. Spann* filed a brief for the Reporters Committee for Freedom of the Press et al. as *amici curiae* urging affirmance.

[1] The regulation provides:

"§ 271.5 Deferment of availability of certain information.

"(a) *Deferred availability of information.* In some instances, certain types of information of the Committee are not published in the FEDERAL REGISTER or made available for public inspection or copying until after such period of time as the Committee may determine to be reasonably necessary to avoid the effects described in paragraph (b) of this section or as may otherwise be necessary to prevent impairment of the effective discharge of the Committee's statutory responsibilities.

"(b) *Reasons for deferment of availability.* Publication of, or access to, certain information of the Committee may be deferred because earlier disclosure of such information would:

"(1) Interfere with the orderly execution of policies adopted by the Committee in the performance of its statutory functions;

"(2) Permit speculators and others to gain unfair profits or to obtain advantages by speculative trading in securities, foreign exchange, or otherwise;

"(3) Result in unnecessary or unwarranted disturbances in the securities market;

"(4) Make open market operations more costly;

"(5) Interfere with the orderly execution of the objectives or policies

certain monetary policy directives from the public during the month they are in effect. At the end of the month, the directives are published in full in the Federal Register. The United States Court of Appeals for the District of Columbia Circuit held that this practice violates the Freedom of Information Act, 5 U. S. C. § 552. 184 U. S. App. D. C. 203, 565 F. 2d 778 (1977). We granted certiorari on the strength of the Committee's representations that this ruling could seriously interfere with the implementation of national monetary policy. 436 U. S. 917 (1978).

I

Open market operations—the purchase and sale of Government securities in the domestic securities market—are the most important monetary policy instrument of the Federal Reserve System.[2] When the Federal Reserve System buys securities in the open market, the payment is ordinarily credited in the reserve account of the seller's bank, increasing the total volume of bank reserves. When the Federal Reserve System sells securities on the open market, the sales price usually is debited in the reserve account of the buyer's bank, decreasing the total volume of reserves. Changes in the volume of bank reserves affect the ability of banks to make loans

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of other Government agencies concerned with domestic or foreign economic or fiscal matters; or

"(6) Interfere with, or impair the effectiveness of, financial transactions with foreign banks, bankers, or countries that may influence the flow of gold and of dollar balances to or from foreign countries."

[2] App. 46, 55. See generally Board of Governors of the Federal Reserve System, The Federal Reserve System, Purposes and Functions 14–15, 49–67 (1974).

Other major economic tools employed by the Federal Reserve System include the setting of reserve requirements for commercial banks that are members of the Federal Reserve System, and the determination of the discount rate for borrowing by member banks. App. 46, 56.

and investments.[3] This in turn has a substantial impact on interest rates and investment activity in the economy as a whole.

The Federal Open Market Committee (FOMC or Committee), petitioner herein, by statute has exclusive control over the open market operations of the entire Federal Reserve System. 12 U. S. C. § 263 (b). The FOMC[4] is charged with conducting open market operations "with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country." § 263 (c). To implement this authority, the Committee has established a combined investment pool for all Federal Reserve banks, known as the System Open Market Account. A senior officer of the Federal Reserve Bank of New York is regularly appointed Account Manager of the System Open Market Account.

The FOMC meets approximately once a month to review the overall state of the economy and consider the appropriate course of monetary and open market policy. The Committee's principal conclusions are embodied in a statement called the Domestic Policy Directive. The Directive summarizes the economic and monetary background of the FOMC's deliberations and indicates in general terms whether the Committee wishes to follow an expansionary, deflationary, or unchanged monetary policy in the period ahead. The Committee also attempts to agree on specific tolerance ranges

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[3] Under the Federal Reserve Board's Regulation D, 12 CFR Pt. 204 (1978), member banks are required to hold reserves in a prescribed ratio to deposits. Member banks typically respond to an increase in available reserves (or to a reduction in the required reserve-to-deposit ratio) by either making new loans and investments, or by selling their excess reserves to other member banks that can take advantage of these reserves because of particular lending or investment opportunities. App. 47.

[4] The Committee is composed of the seven members of the Board of Governors of the Federal Reserve System, and five representatives of the Federal Reserve banks. 12 U. S. C. § 263 (a).

for the growth in the money supply and for the federal funds rate.[5] The recent practice of the Committee has been to include these tolerance ranges in the Domestic Policy Directive.[6]

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[5] The tolerance ranges for the growth of the money supply are stated in terms of "M_1," defined as currency in circulation plus demand deposits held by the public in commercial banks, and "M_2," defined as "M_1" plus time and savings deposits, other than large negotiable certificates of deposit, held in commercial banks. App. 81. The federal funds rate is the rate at which commercial banks are willing to lend or borrow immediately available reserves on an overnight basis. *Id.*, at 78. As such, it is particularly sensitive to changes in the availability of reserves. The Committee's use of these concepts, expressed in terms of tolerance ranges, is illustrated by the operative language of the Domestic Policy Directive adopted at the October 17, 1978, meeting of the FOMC:

"Early in the period before the next regular meeting, System open market operations shall be directed at attaining a weekly-average Federal funds rate slightly above the current level. Subsequently, operations shall be directed at maintaining the weekly-average Federal funds rate within the range of 8¾ to 9¼ per cent. In deciding on the specific objective for the Federal funds rate the Manager shall be guided mainly by a range of tolerance for growth in *M*–2 over the October-November period of 5½ to 9½ per cent, provided that growth of *M*–1 over that period does not exceed an annual rate of 6½ per cent." 64 Fed. Res. Bull. 947, 956, (1978).

[6] Prior to February 1977, the Domestic Policy Directives did not include specific tolerance ranges for the growth in money supply and the federal funds rate. Instead, the operative language of the Directives contained such general phrases as "the Committee seeks to achieve some easing in bank reserve and money market conditions, provided that the monetary aggregates do not appear to be growing excessively"; "the Committee seeks to achieve bank reserve and money market conditions consistent with more rapid growth in monetary aggregates over the months ahead than has occurred in recent months"; or "the Committee seeks to achieve bank reserve and money market conditions consistent with moderate growth in monetary aggregates over the months ahead." App. 82–83. The record does not indicate in what manner the tolerance ranges were communicated to the Account Manager during this period.

After February 1977, the operative language of the Directives began to incorporate specific tolerance ranges of the form set forth in n. 5, *supra*. The record contains no explanation as to why the FOMC began including

The day-to-day operations of the Account Manager are guided by the Domestic Policy Directive and associated tolerance ranges, and by a daily conference call with the staff and at least one member of the FOMC. Subject to this oversight, the Manager has broad discretion in implementing the Committee's policy. In transacting business for the System Open Market Account, he deals with about 25 dealers who actively trade in United States Government and federal agency securities. Roughly half of these dealers are departments of large commercial banks; the others include large investment firms and smaller firms that specialize in Government securities. These dealers trade primarily for their own account. App. 33.

The Federal Reserve Board is required by statute to keep a record of all policy actions taken by the FOMC with respect to open market operations. 12 U. S. C. § 247a. To comply with this requirement, the FOMC secretariat prepares a document during the month after each Committee meeting. This document is called the Record of Policy Actions. It contains a general review of economic and monetary conditions at the time of the meeting, the text of the Domestic Policy Directive, any other policy actions taken by the Committee, the votes on these actions, and the dissenting views, if any. A draft of the Record of Policy Actions is distributed to the participants at the next meeting of the Committee for their comments, and is revised and released for publication in the Federal Register a few days later. 41 Fed. Reg. 22261 (1976).

In other words, the Record of Policy Actions is published in the Federal Register almost as soon as it is drafted and approved in final form by the Committee.[7] The Domestic

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the tolerance ranges in the Directives at that time. Nor is there any explanation in the Record of Policy Actions issued after the February meeting. 63 Fed. Res. Bull. 380–394 (1977).

[7] Prior to 1967, the Records of Policy Actions were published only in the Federal Reserve Board's Annual Report to Congress. See Committee's Press Release, Mar. 24, 1975, App. 59; 413 F. Supp. 494, 504 (DC 1976). In response to the passage of the Freedom of Information Act in that

Policy Directive, however, exists as a document for approximately one month before it makes its first public appearance as part of the Record of Policy Actions. Moreover, by the time the Domestic Policy Directive is released as part of the Record of Policy Actions, it has been supplanted by a new Directive and is no longer the current and effective policy of the FOMC.

II

Respondent, when this action was instituted in May 1975, was a law student at Georgetown University Law Center, Washington, D. C. App. 8. The complaint alleged that he had "developed a strong interest in administrative law and the operation of agencies of the federal government," and had formed a desire to study "the process by which the FOMC regulates the national money supply through the frequent adoption of domestic policy directives." *Ibid.*

In pursuit of these professed academic interests, respondent in March 1975, through counsel, filed a request under the Freedom of Information Act (FOIA) seeking the "[r]ecords of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies." *Id.*, at 13.[8]

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year, the FOMC instituted a policy of releasing the Record of Policy Actions, including the Domestic Policy Directive, 90 days after the Directive was adopted by the Commission. *Ibid.* On March 21, 1975, just before the instant lawsuit was filed, the period of delay was shortened to 45 days. 40 Fed. Reg. 13204 (1975). The present policy was adopted on May 24, 1976. 41 Fed. Reg. 22261 (1976).

Because the Record of Policy Actions is not completed and formally adopted until the meeting after the meeting to which it applies, respondent apparently conceded in the Court of Appeals that the Committee's present guidelines for release of that document are consistent with the FOIA. See 184 U. S. App. D. C. 203, 207, 565 F. 2d 778, 782 (1977).

[8] Respondent also requested the Memoranda of Discussion for the January 1975 and February 1975 meetings. App. 13. Memoranda of Discus-

The FOMC denied the request, explaining that the Records of Policy Actions, including the Domestic Policy Directive, were available only on a delayed basis under the policy set forth in 12 CFR § 271.5.[9] An administrative appeal resulted in release of the requested documents, but only because the withholding period by then had expired. Governor Robert C. Holland of the Federal Reserve Board, on behalf of the Committee, wrote to respondent's counsel that the Committee remained firmly committed to what he described as "a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies." App. 21.

Respondent then instituted this litigation in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief against the operation of 12 CFR § 271.5 and the policy of delayed disclosure. App. 7. The FOMC in due course moved for summary judgment, and submitted affidavits from Committee members and staff that generally advanced two reasons why immediate disclosure of the Domestic Policy Directives and tolerance ranges would interfere with the FOMC's statutory functions.

First, the Committee argued that immediate release of the

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sion were detailed minutes of the statements made and actions taken at the Committee's meetings. The District Court held that under 5 U. S. C. § 552 (b)(5) respondent was entitled to those parts of the Memoranda that contained "reasonably segregable" statements of fact, 413 F. Supp., at 506, and the parties subsequently agreed on the factual portions of the Memoranda to be produced. This ruling was not challenged in the Court of Appeals, see 184 U. S. App. D. C., at 207 n. 8, 565 F. 2d, at 782 n. 8, and is not in issue here.

In May 1976, the FOMC voted to discontinue the preparation of Memoranda of Discussion, 62 Fed. Res. Bull. 581, 590–591 (1976).

[9] In accordance with the then-current policy of the FOMC, see n. 7, *supra*, the regulation specifically provided that "the Committee's current economic policy directive adopted at each meeting of the Committee is pubished in the FEDERAL REGISTER approximately 90 days after the date of its adoption." 12 CFR § 271.5 (1975).

Domestic Policy Directive and tolerance ranges would make it difficult to implement limited or gradual changes in monetary policy. Disclosure of the FOMC's monetary policy objectives would have an immediate "announcement effect," as market participants moved quickly to adjust their holdings of Government securities in anticipation of purchases or sales by the System Open Market Account. This would result in sudden price and interest rate movements, which might be considerably larger than the Committee contemplated and might be beyond the power of the FOMC or the Federal Reserve to control.

Second, the FOMC contended that immediate disclosure of the Directive and tolerance ranges would permit large institutional investors, who would have the means to analyze the information quickly and act rapidly in buying or selling securities, to obtain an unfair advantage over small investors.

Respondent submitted no counter-affidavits to these contentions, since he considered them "irrelevant" to the legal issues presented. Brief for Respondent 33–34, n. 12. The District Court apparently agreed. Without addressing the FOMC's affidavits, or entering any findings about the effect that premature disclosure might have on open market operations, the court granted summary judgment for respondent. 413 F. Supp. 494 (DC 1976). It held, as the FOMC had conceded, that the Domestic Policy Directives were "statements of general policy . . . formulated and adopted by the agency" that, under 5 U. S. C. § 552 (a)(1)(D), had to be "currently publish[ed] in the Federal Register for the guidance of the public." [10] It further concluded that by waiting until a new

[10] Section 552 provides:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

. . . . . .

"(D) substantive rules of general applicability adopted as authorized by

Directive had been promulgated before publishing the preceding one, the FOMC was in violation of the "current publication" requirement. 413 F. Supp., at 505. Finally, the court rejected the Committee's contentions that the Domestic Policy Directives could be withheld under either Exemption 2 of the FOIA, relating to internal personnel rules and practices of an agency, or Exemption 5, relating to inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with an agency.[11]

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the FOMC did not contest the ruling that the Domestic Policy Directives were "statements of general policy" that, under § 552 (a)(1)(D), had to be "currently publish[ed]" in the Federal Register. Similarly, it did not challenge the conclusion that the 1-month delay failed to satisfy the current-publication requirement. Moreover, the Committee abandoned the argument that the Directives were covered by Exemption 2. The Committee, instead, concentrated on the contention that premature disclosure would seriously disrupt the conduct of open market operations, and continued to urge that the policy of delayed disclosure was authorized by Exemption 5.

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law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency."

The District Court also held that policy actions of the FOMC other than the Domestic Policy Directive had to be indexed and promptly disclosed pursuant to 5 U. S. C. § 552 (a)(B).

[11] Title 5 U. S. C. § 552 also provides:

"(b) This section does not apply to matters that are—

. . . . .

"(2) related solely to the internal personnel rules and practices of an agency;

. . . . .

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The Court of Appeals rejected the FOMC's Exemption 5 arguments. It held that the Domestic Policy Directives were not exempt from disclosure under the "executive" privilege attaching to predecisional communications. It also ruled that Exemption 5 was not designed to protect against premature disclosure of otherwise final decisions. Finally, it concluded that there was no other civil discovery privilege that could serve as a basis for holding that the Directives were exempt from disclosure under Exemption 5. Like the District Court, the Court of Appeals expressed no opinion about the FOMC's assertion that immediate disclosure of the Domestic Policy Directives and tolerance ranges would seriously interfere with the conduct of national monetary policy. If the assertion were true, the court suggested, Congress could specifically exempt this material from the prompt-disclosure requirement of the FOIA.[12] 184 U. S. App. D. C. 203, 565 F. 2d 778 (1977).

III

This Court has had frequent occasion to consider the FOIA,[13] and it is not necessary to describe its history and background in detail. It suffices to say that the purpose of the FOIA is "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delin-

[12] The third exemption specified by 5 U. S. C. § 552 (b) covers matters that are

"(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

[13] See *EPA* v. *Mink*, 410 U. S. 73 (1973); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1 (1974); *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132 (1975); *Renegotiation Board* v. *Grumman Aircraft Corp.*, 421 U. S. 168 (1975); *FAA Administrator* v. *Robertson*, 422 U. S. 255 (1975); *Department of Air Force* v. *Rose*, 425 U. S. 352 (1976); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214 (1978); *Chrysler Corp.* v. *Brown*, 441 U. S. 281 (1979).

eated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). The Act makes available to any person all agency records, which it divides into three categories: some must be currently published in the Federal Register, 5 U. S. C. § 552 (a)(1); others must be "promptly publish[ed]" or made publicly available and indexed, § 552 (a)(2); and all others must be promptly furnished on request, § 552 (a)(3). It then defines nine specific categories of records to which the Act "does not apply." § 552 (b). The district court is given jurisdiction to enjoin an agency from withholding agency records, and to order the production of any agency records improperly withheld. § 552 (a)(4)(B). The burden in any such proceeding is on the agency to establish that the requested information is exempt. *Ibid.*

At issue here is Exemption 5 of the FOIA, which provides that the affirmative disclosure provisions do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 552 (b)(5). Exemption 5, in other words, applies to documents that (a) are "inter-agency or intra-agency memorandums or letters," and (b) consist of material that "would not be available by law to a party . . . in litigation with the agency."

A

There can be little doubt that the FOMC's Domestic Policy Directives constitute "inter-agency or intra-agency memorandums or letters." FOMC is clearly an "agency" as that term is defined in the Administrative Procedure Act. 5 U. S. C. §§ 551 (1), 552 (e). And the Domestic Policy Directives are essentially the FOMC's written instructions to the Account Manager, a subordinate official of the agency. These instructions, although possibly of interest to members of the public, are binding only upon the Account Manager. The Directives do not establish rules that govern the adjudication of in-

dividual rights, nor do they require particular conduct or forbearance by any member of the public. They are thus "intra-agency memorandums" within the meaning of Exemption 5.

B

Whether the Domestic Policy Directives "would not be available by law to a party . . . in litigation with the agency" presents a more difficult question. The House Report states that Exemption 5 was intended to allow an agency to withhold intra-agency memoranda which would not "routinely be disclosed to a private party through the discovery process in litigation with the agency . . . ." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). *EPA* v. *Mink*, 410 U. S. 73, 86–87 (1973), recognized that one class of intra-agency memoranda shielded by Exemption 5 is agency reports and working papers subject to the "executive" privilege for predecisional deliberations. *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132 (1975), confirmed this interpretation, and further held that Exemption 5 encompasses materials that constitute a privileged attorney's work product. *Id.*, at 154–155.

The FOMC does not contend that the Domestic Policy Directives are protected by either the privilege for predecisional communications or the privilege for an attorney's work product.[14] Its principal argument, instead, is that Exemption 5 confers general authority upon an agency to delay disclosure of intra-agency memoranda that would undermine the effectiveness of the agency's policy if released immediately. This general authority exists, according to the FOMC, even if the memoranda in question could be routinely discovered by a party in civil litigation with the agency.

We must reject this analysis. First, since the FOMC does not indicate that the asserted authority to defer disclosure of

[14] Although the FOMC argued in the Court of Appeals that the Domestic Policy Directives were protected by executive privilege, it has not presented that argument here. Brief for Petitioner 30 n. 22.

intra-agency memoranda rests on a privilege enjoyed by the Government in the civil discovery context, its argument is fundamentally at odds with the plain language of the statute. *EPA* v. *Mink*, 410 U. S., at 85–86; *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S., at 149. In addition, the Committee's argument proves too much. Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or otherwise would not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest" standard. H. R. Rep. No. 1497, *supra*, at 5, 9; S. Rep. No. 813, *supra*, at 3, 5, 8; *EPA* v. *Mink*, 410 U. S., at 78–80.

The FOMC argues, in the alternative, that there are several civil discovery privileges, in addition to the privileges for predecisional communications and an attorney's work product, that would allow a district court to delay discovery of documents such as the Domestic Policy Directives until they are no longer operative. The Committee contends that Exemption 5 incorporates each of these privileges, and that it thus shields the Directives from a requirement of immediate disclosure.

Preliminarily, we note that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 254 n. 12 (1978) (POWELL, J., concurring in part and dissenting in part). There are, to be sure, statements in our cases construing Exemption 5 that imply as much. See, *e. g.*, *Renegotiation Board* v. *Grumman Aircraft Corp.*, 421 U. S. 168, 184 (1975) ("Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and

case law in the pretrial discovery context"). Heretofore, however, this Court has recognized only two privileges in Exemption 5, and, as *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S., at 150–154, emphasized, both these privileges are expressly mentioned in the legislative history of that Exemption.[15] Moreover, material that may be subject to some other discovery privilege may also be exempt from disclosure under one of the other eight exemptions of FOIA, particularly Exemptions 1, 4, 6, and 7.[16] We hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption. Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.

The most plausible of the three privileges asserted by the FOMC[17] is based on Fed. Rule Civ. Proc. 26 (c)(7), which

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[15] See H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966) (referring to "advice from staff assistants and the exchange of ideas among agency personnel"); S. Rep. No. 813, 89th Cong., 1st Sess., 2 (1965) (noting that Exemption 5 includes "the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties").

[16] Exemption 1 applies to classified national security information; Exemption 4 applies to trade secrets and privileged commercial or financial information obtained from a person; Exemption 6 covers personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of privacy; and Exemption 7 shields certain types of investigatory records gathered for law enforcement purposes. 5 U. S. C. §§ 552 (b)(1), (4), (6), (7).

[17] The two other privileges advanced by the FOMC are a privilege for "official government information" whose disclosure would be harmful to the public interest, see *Machin* v. *Zuckert*, 114 U. S. App. D. C. 335, 338, 316 F. 2d 336, 339, cert. denied, 375 U. S. 896 (1963), and a privilege based on Fed. Rule Civ. Proc. 26 (c)(2), which permits a court to order that discovery "may be had only on specified terms and conditions, including a designation of the time or place." In light of our disposition of

provides that a district court, "for good cause shown," may order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." [18] The Committee argues that the Domestic Policy Directives constitute "confidential . . . commercial information," at least during the month in which they provide guidance to the Account Manager, and that they therefore would be privileged from civil discovery during this period.

The federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information. See, *e. g., E. I. du Pont de Nemours Powder Co.* v. *Masland,* 244 U. S. 100, 103 (1917); 8 J. Wigmore, Evidence § 2212, pp. 156–157 (McNaughton rev. 1961). The Federal Rules of Civil Procedure provide similar qualified protection for trade secrets and confidential commercial information in the civil discovery context. Federal Rule Civ. Proc. 26 (c)(7), which replaced former Rule 30 (b) in 1970, was intended in this respect to "reflec[t] existing law." Advisory Committee's Notes on Fed. Rule Civ. Proc. 26, 28 U. S. C. App., p. 444. The Federal Rules, of course, are fully applicable to the United States as a party. See, *e. g., United States* v. *Procter & Gamble Co.,* 356 U. S. 677, 681 (1958); 4 J. Moore, Federal Practice ¶ 26.61 [2], p. 26–263, (1976). And

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this case, we do not consider whether either asserted privilege is incorporated in Exemption 5.

[18] The full text reads:

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Fed. Rule Civ. Proc. 26 (c)(7).

we see no reason why the Government could not, in an appropriate case, obtain a protective order under Rule 26 (c)(7).[19]

To be sure, the House and Senate Reports do not provide the same unequivocal support for an Exemption 5 privilege for "confidential . . . commercial information" as they do for the executive and attorney work product privileges. Nevertheless, we think that the House Report, when read in conjunction with the hearings conducted by the relevant House and Senate Committees, can fairly be read as authorizing at least a limited form of Exemption 5 protection for "confidential . . . commercial information."

In hearings that preceded the enactment of the FOIA, various agencies complained that the original Senate bill, which did not include the present Exemption 5,[20] failed to

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[19] See *Menominee Engineering Corp.* v. *United States*, 20 Fed. Rules Serv. 2d 894 (Ct. Cl. 1975); *Consolidated Box Co., Inc.* v. *United States*, 18 Fed. Rules Serv. 2d 115 (Ct. Cl. 1973) (involving applications for protective orders under the identically worded Rule 71 (f) of the Court of Claims).

[20] S. 1666, introduced in the 88th Congress in 1963, included a fifth-numbered exemption for "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy." It was reported favorably by the Senate Judiciary Committee, S. Rep. No. 1219, 88th Cong., 2d Sess. (1964), and passed the Senate, but reached the House too late for action. *Department of Air Force* v. *Rose*, 425 U. S., at 362–363; *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S., at 18 n. 18. Substantially the same measure was reintroduced in the 89th Congress as S. 1160 and H. R. 5012. Freedom of Information Source Book, Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, S. Doc. No. 93–82, p. 8 (1974). After additional hearings in the House in March and April 1965, Hearings on H. R. 5012, etc., before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess. (1965), and in the Senate in May 1965, Hearings on S. 1160, etc., before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965), the Senate Judiciary Committee struck the words "dealing solely with matters of law or policy," and inserted in lieu thereof "which would not be available by law to a private party in litigation with

provide sufficient protection for confidential commercial information and other information about Government business transactions. For example, the Department of Defense expressed concern that information relating to the purchase or sale of real estate, materials, or other property might not be protected, Hearings on S. 1160, etc., before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 418 (1965); the General Services Administration stressed the need to avoid early disclosure of information that might prejudice the Government's bargaining position in business transactions, *id.*, at 480; and the Post Office Department urged that in matters such as the negotiation of contracts, it should stand on the same footing as a private party. Hearings on H. R. 5012, etc., before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., 224 (1965). Included among those expressing such criticism was the Acting General Counsel of the Department of the Treasury, who specifically referred to the Department's concern about premature disclosure of information concerning Federal Reserve open market operations. *Id.*, at 49.[21]

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the agency." S. Rep. No. 813, *supra* n. 15, at 1. The bill, as thus amended, passed the Senate on October 13, 1965. It was reported favorably by the House Committee on Government Operations, H. R. Rep. No. 1497, *supra* n. 15, passed the House on June 20, 1966, and was signed by President Johnson on July 4, 1966.

[21] Acting General Counsel Smith stated:

"I might interpolate at this point another example or two which I do not have in my statement. Information as to purchases by the Federal Reserve System, for example, of Government securities in the market, if prematurely disclosed could have, we feel, serious effects on the orderly handling of the Government's financing requirements so that in all of these things there is a question of timing. There are many things on which full disclosure is made in reports which are published or filed with the Congress with a timelag, there is no basic secrecy about these matters, and yet the premature release of these could be very damaging to the general interest."

After the hearings were completed, Congress amended the provision that ultimately became Exemption 5 to provide for nondisclosure of materials that "would not be available by law to a party . . . in litigation with the agency." The House Report, echoing the Report on the original Senate bill, S. Rep. No. 1219, 88th Cong., 2d Sess., 6–7, 13–14 (1964), explained that one purpose of the revised Exemption 5 was to protect internal agency deliberations and thereby ensure "full and frank exchange of opinions" within an agency. H. R. Rep. No. 1497, *supra* n. 15, at 10. It then added, significantly:

> "Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated *before it completes the process of awarding a contract* or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy" (emphasis added). *Ibid.*

In light of the complaints registered by the agencies about premature disclosure of information relating to Government contracts, we think it is reasonable to infer that the House Report, in referring to "information . . . generated [in] the process of awarding a contract," specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts.[22]

This conclusion is reinforced by consideration of the differences between commercial information generated in the process of awarding a contract, and the type of material protected by executive privilege. The purpose of the privilege for predecisional deliberations is to insure that a decision-

[22] Although the Senate Report does not contain a similar reference to information generated in the process of awarding a contract, there is no inconsistency in this respect between the House Report and the Senate Report. Cf. *Department of Air Force* v. *Rose*, 425 U. S., at 363–367.

maker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports, and expression of opinion within the agency. The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn.

We are further convinced that recognition of an Exemption 5 privilege for confidential commercial information generated in the process of awarding a contract would not substantially duplicate any other FOIA exemption. The closest possibility is Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U. S. C. § 552 (b)(4). Exemption 4, however, is limited to information "obtained from a person," that is, to information obtained outside the Government. See 5 U. S. C. § 551 (2). The privilege for confidential information about Government contracts recognized by the House Report, in contrast, is necessarily confined to information generated by the Federal Government itself.

We accordingly conclude that Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract.[23]

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[23] Our conclusion that the Domestic Policy Directives are at least

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The only remaining questions are whether the Domestic Policy Directives constitute confidential commercial information of the sort given qualified protection by Exemption 5, and, if so, whether they would in fact be privileged in civil discovery. Although the analogy is not exact, we think that the Domestic Policy Directives and associated tolerance ranges are substantially similar to confidential commercial information generated in the process of awarding a contract. During the month that the Directives provide guidance to the Account Manager, they are surely confidential, and the information is commercial in nature because it relates to the buying and selling of securities on the open market. Moreover, the Directive and associated tolerance ranges are generated in the course of providing ongoing direction to the Account

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potentially eligible for protection under Exemption 5 does not conflict with the District Court's finding that the Directives are "statements of general policy . . . formulated and adopted by the agency," which must be "currently publish[ed]" in the Federal Register pursuant to 5 U. S. C. § 552 (a)(1). 413 F. Supp., at 504–505. It is true that in *NLRB* v. *Sears, Roebuck & Co.*, we noted that there is an obvious relationship between Exemption 5 and the affirmative portion of the FOIA which requires the prompt disclosure and indexing of final opinions and statements of policy that have been adopted by the agency. 5 U. S. C. § 552 (a)(2). We held that, with respect to final opinions, Exemption 5 can never apply; with respect to other documents covered by 5 U. S. C. § 552 (a)(2), we said that we would be "reluctant" to hold that the Exemption 5 privilege would ever apply. 421 U. S., at 153–154. These observations, however, were made in the course of a discussion of the privilege for predecisional communications. It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications, on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges. In this respect, we note that *Sears* itself held that a memorandum subject to the affirmative disclosure requirement of § 552 (a)(2) was nevertheless shielded from disclosure under Exemption 5 because it contained a privileged attorney's work product. 421 U. S., at 160.

Manager in the execution of large-scale transactions in Government securities; they are, in this sense, the Government's buy-sell order to its broker.

Although the Domestic Policy Directives can fairly be described as containing confidential commercial information generated in the process of awarding a contract, it does not necessarily follow that they are protected against immediate disclosure in the civil discovery process. As with most evidentiary and discovery privileges recognized by law, "there is no absolute privilege for trade secrets and similar confidential information." 8 C. Wright & A. Miller, Federal Practice and Procedure § 2043, p. 300 (1970); 4 J. Moore, Federal Practice ¶ 26.60 [4], p. 26–242 (1970). Cf. *United States* v. *Nixon*, 418 U. S. 683, 705–707 (1974). "The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection." Advisory Committee's Notes on Fed. Rule Civ. Proc. 26, 28 U. S. C. App., p. 444; 4 J. Moore, Federal Practice ¶ 26.75, pp. 26–540 to 26–543 (1970).[24] We are mindful that "the discovery rules can only be applied under Exemption 5 by way of rough analogies," *EPA* v. *Mink*, 410 U. S., at 86, and, in particular, that the individual FOIA appli-

[24] Actually, orders forbidding any disclosure of trade secrets or confidential commercial information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel, see, *e. g.*, *Chesa International, Ltd.* v. *Fashion Associates, Inc.*, 425 F. Supp. 234 (SDNY 1977); *Xerox Corp.* v. *International Business Machines Corp.*, 64 F. R. D. 367 (SDNY 1974); *Scovill Mfg. Co.* v. *Sunbeam Corp.*, 61 F. R. D. 598 (Del. 1973); or to the parties, see, *e. g.*, *Borden Co.* v. *Sylk*, 289 F. Supp. 847 (ED Pa. 1968); *United States* v. *Article of Drug Consisting of 30 Individually Cartoned Jars, More or Less*, 43 F. R. D. 181 (Del. 1967); *United States* v. *Standard Oil Co. (New Jersey)*, 23 F. R. D. 1 (SDNY 1958). We think the Domestic Policy Directives should be considered "privileged," for Exemption 5 purposes, if any type of order would be appropriate forbidding disclosure of the confidential material therein to the general public.

cant's need for information is not to be taken into account in determining whether materials are exempt under Exemption 5. *Ibid.; NLRB* v. *Sears, Roebuck & Co.*, 421 U. S., at 149 n. 16. Nevertheless, the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure, should continue to serve as relevant criteria in determining the applicability of this Exemption 5 privilege. Accordingly, we think that if the Domestic Policy Directives contain sensitive information not otherwise available, and if immediate release of these Directives would significantly harm the Government's monetary functions or commercial interests, then a slight delay in the publication of the Directives, such as that authorized by 12 CFR § 271.5, would be permitted under Exemption 5.

Here, the District Court made no findings about the impact of immediate disclosure of the Domestic Policy Directives and tolerance ranges. The Committee submitted unanswered affidavits purporting to show that prompt disclosure of this information would interfere with the orderly execution of the FOMC's monetary policies, and would give unfair advantage to large investors. In this Court, the FOMC has sought to supplement those affidavits by arguing, for the first time, that immediate release of the Domestic Policy Directives would jeopardize the Government's commercial interests by imposing substantial additional borrowing costs on the United States Treasury.[25] Respondent has sought, again for the first

[25] In its brief, the Committee argues that the "announcement effect" produced by immediate disclosure of the Directives and tolerance ranges would cause sharper fluctuations in the interest rates on Government securities traded by the System Open Market Account. As a result of these fluctuations, the risk of dealing in or purchasing Government securities would increase. To compensate for this larger risk, dealers and purchasers would demand a higher yield on Government securities. Given the huge amount of borrowing by the Federal Government each year, even a small change in yield on Government securities would represent a substantial cost to the Government. The FOMC estimates that the cost might run as high as $300 million annually. Brief for Petitioner 29.

time, to show that there is substantial disagreement among experts about the impact of prompt disclosure of the Directives, and that some experts actually believe prompt disclosure would have a beneficial effect. Brief for Respondent 33–46.

Under the circumstances, we do not consider whether, or to what extent, the Domestic Policy Directives would in fact be afforded protection in civil discovery. That determination must await the development of a proper record. If the District Court on remand concludes that the Directives would be afforded protection, then it should also consider whether the operative portions of the Domestic Policy Directives [26] can feasibly be segregated from the purely descriptive materials therein, and the latter made subject to disclosure or publication without delay. See *EPA* v. *Mink*, 410 U. S., at 91.

The judgment of the Court of Appeals is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE STEWART* joins, dissenting.

The practical question in this case is whether the Federal Reserve System's monthly changes in monetary policy should be made available immediately to the general public or should be filtered into the market through a handful of sophisticated representatives of large commercial banks and investment firms. The legal question is whether the statutory requirement that statements describing such policy changes be published "currently" means what it says.

On the practical level, it seems to me that the operation of an "open" market committee should be open to all—not just

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[26] See nn. 5 and 6, *supra*.

*MR. JUSTICE STEWART joins this dissenting opinion insofar as it expresses views concerning the "legal question" presented.

to a selected few.[1] On the legal level, I am satisfied that the District Court and the Court of Appeals correctly read the plain language of the Freedom of Information Act.

The FOIA, 5 U. S. C. § 552 (a)(1), provides that every "agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . statements of general policy . . . formulated and adopted by the agency." It is agreed that the Federal Open Market Committee is an agency within the meaning of the Act, and both the District Court and the Court of Appeals concluded that the monthly monetary policy directives are "statements of general policy." This Court does not disagree with that conclusion. It is plain therefore that the statute imposes a mandatory requirement of "current" publication.

In my opinion that requirement is not satisfied by withholding publication "temporarily"—*i. e.*, until the policy directives become obsolete. The same principle of construction should apply to monthly policy statements as to annual policy statements. They should be made public while they are effective.

Although the Court recognizes that these policy directives may not be permanently withheld from public view without violating the Act, it nonetheless concludes that their tempo-

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[1] As Professor Milton Friedman of the University of Chicago stated: "May I say also that I have long been in favor of the immediate release of the records of policy actions of the FOMC. I have recommended repeatedly in testimony to Congress that the FOMC meetings be held on a Friday so that the record of policy actions can be written . . . and then released not later than Sunday night so that no business days pass without this record being available." Hearings on H. R. 9465 and 9589 before the Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess., 202 (1977).

These views also reflect those of Sherman Maisel, a former member of the Federal Reserve Board, who has written in this context that "[m]ost experts on markets . . . believe that the better the information, the better the market." S. Maisel, Managing the Dollar 175 (1973).

rary suppression is warranted by one of the statutory exemptions to the Act. I find this conclusion incomprehensible.

In the first place, nothing in any of the nine exemptions to the Act has any bearing on the present situation.[2] But more

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[2] The Court relies on Exemption 5, but I find its analysis unpersuasive. The Court admirably recognizes the danger of allowing every conceivable discovery privilege to be read into Exemption 5. See *ante*, at 354–355. It proposes, therefore, that only those privileges that are recognized in the legislative history of FOIA should be incorporated in the Exemption. To the extent, however, that *every* reference in the subcommittee hearings to the danger of disclosing some type of governmental information suffices under this test—virtually every agency appeared before Congress with a list of such "dangers"—the Exemption would render the Act meaningless. On the other hand, if the Court's test is designed to limit Exemption 5 to those references in the legislative history that clearly bear on Congress' final understanding of the Act, I see no justification for the Court's recognition of a vague "commercial information" component of that Exemption.

First, the passage in the House Report that the Court relies on, which refers to "information which [an agency] has received or generated before it completes the process of awarding a contract," H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966), is rather clearly directed both at a different governmental activity (*i. e.*, procurement of goods or services by the Government acting as commercial buyer) and at a different stage in the course of that activity (*i. e.*, "*before* it completes [its] process") than is involved in this case. Here, the agency is engaged in a clearly governmental activity—the regulation of financial markets—and has already settled upon its final position and has acted upon it. Moreover, the absence in the Senate Report of even this thin reed to support the Court's analysis is significant in light of our recognition that that Report, rather than the House Report, is the most accurate reflection of the congressional will with respect to FOIA. *Department of Air Force* v. *Rose*, 425 U. S. 352, 363–367. Finally, the fact that Congress did include a "commercial information" exemption in the Act, albeit one that clearly does not apply in this case—Exemption 4—should persuasively counsel against our adopting a novel and strained interpretation of another exemption to encompass such information. This is particularly so in this case in view of the fact that the very agency involved here unsuccessfully requested that Congress amend the proposed Exemption 4 to provide protection for the policy directives involved in this case. Hearings on H. R. 5012, etc., before a Subcommittee of the House Committee on Govern-

fundamentally, the Court's temporary exemption is inconsistent with the structure of the Act. Under FOIA, all information must be released, in the specified manner—*i. e.*, in this case, "currently"—unless it fits into one of nine categories. As to material in those categories, the Act simply *"does not apply."* 5 U. S. C. § 552 (b) (emphasis added). Between "current" release and total exemption, therefore, the statute establishes no middle ground. Accordingly, I cannot agree with the Court's recognition of a third alternative for "exempt" material to which the Act nonetheless applies—albeit on a delayed basis. If there is to be a new category subject to full disclosure but only after a "slight delay," I believe it should be created by Congress rather than the Court.

The Court's newly created category will impose substantial litigation costs and burdens on any requesting party seeking to overcome an agency's objection to immediate disclosure. For henceforth that party must prove that compliance with the statute's disclosure mandate would not "significantly harm the Government's monetary functions or commercial interests." *Ante*, at 363. The imposition of such an obstacle to prompt disclosure is inconsistent with the overriding statutory policy of giving the ordinary citizen unfettered access to information about how his Government operates.[3]

I respectfully dissent.

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ment Operations, 89th Cong., 1st Sess., 51, 55, 228, 229 (1965). Having failed to provide such protection in Exemption 4, which so clearly relates to commercial information, Congress will no doubt be surprised to find that the Court has read that protection into Exemption 5.

[3] *E. g., Department of Air Force* v. *Rose, supra*, at 361; *EPA* v. *Mink*, 410 U. S. 73, 79–80.

GANNETT CO., INC. *v.* DePASQUALE, COUNTY COURT JUDGE OF SENECA COUNTY, N. Y., ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 77–1301. Argued November 7, 1978—Decided July 2, 1979

At a pretrial hearing on a motion to suppress allegedly involuntary confessions and certain physical evidence, respondents Greathouse and Jones, who were defendants in a state prosecution for second-degree murder, robbery, and grand larceny, requested that the public and the press be excluded from the hearing, arguing that the unabated buildup of adverse publicity had jeopardized their ability to receive a fair trial. The District Attorney did not oppose the motion and a reporter employed by petitioner, whose newspapers had given extensive coverage of the crime through the defendants' indictment and arraignment, made no objection at the time of the closure motion though she was present in the courtroom. Respondent trial judge granted the motion, and, in response to the reporter's letter on the next day asserting a right to cover the hearing and requesting access to the transcript, stated that the suppression hearing had concluded and that any decision on immediate release of the transcript had been reserved. Petitioner then moved to have the closure order set aside but the trial judge, after a hearing, refused to vacate the order or grant petitioner immediate access to the transcript, ruling that the interest of the press and the public was outweighed by the defendants' right to a fair trial. Petitioner immediately commenced a proceeding in the nature of prohibition and mandamus in the New York Supreme Court, Appellate Division, challenging the trial court's orders on First, Sixth, and Fourteenth Amendment grounds. The Appellate Division vacated the orders, holding that they transgressed the public's vital interest in open judicial proceedings and further constituted an unlawful prior restraint in violation of the First and Fourteenth Amendments. The New York Court of Appeals, although holding that the case was technically moot because shortly before entry of the Appellate Division's judgment, the defendants had pleaded guilty to lesser included offenses and a transcript of the suppression hearing was made available to petitioner, nevertheless retained jurisdiction in view of the importance of the issues and upheld the exclusion of the press and the public from the pretrial proceeding.

Held:

1. The controversy is not moot. This Court's jurisdiction is not de-

feated "simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546. Here, the order closing the pretrial hearing is too short in its duration to permit full review, and it is reasonably to be expected that petitioner will be subjected to similar closure orders in the future. Pp. 377–378.

2. The Constitution does not give petitioner an affirmative right of access to the pretrial proceeding, all the participants in the litigation having agreed that it should be closed to protect the fair-trial rights of the defendants. Pp. 378–394.

(a) To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity, and he may take protective measures even when they are not strictly and inescapably necessary. Publicity concerning pretrial suppression hearings poses special risks of unfairness because it may influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial. Pp. 378–379.

(b) The Sixth Amendment's guarantee of a public trial is for the benefit of the defendant alone. The Constitution nowhere mentions any right of access to a criminal trial on the part of the public. Cf. *In re Oliver*, 333 U. S. 257; *Estes* v. *Texas*, 381 U. S. 532. While there is a strong societal interest in public trials, nevertheless members of the public do not have an enforceable right to a public trial that can be asserted independently of the parties in the litigation. The adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation. Pp. 379–384.

(c) The history of the Sixth Amendment's public-trial guarantee demonstrates no more than the existence of a common-law rule of open civil and criminal proceedings, not a constitutional right of members of the general public to attend a criminal trial. Even if the Sixth and Fourteenth Amendments could properly be viewed as embodying the common-law right of the public to attend criminal trials, there is no persuasive evidence that the public had any right at common law to attend pretrial proceedings. To the contrary, by the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant, and pretrial proceedings, precisely because of the same concern for a fair trial, were never characterized by the same degree of openness as were actual trials. Pp. 384–391.

(d) Even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee a right to members of the press and the public

to attend criminal trials in some situations, this putative right was given all appropriate deference by the state *nisi prius* court in the present case. Even though none of the spectators present in the courtroom, including petitioner's reporter, objected when the defendants made the closure motion, petitioner's counsel was given an opportunity to be heard, and the trial court thereafter concluded that the defendants' right to a fair trial outweighed the "constitutional rights of the press and the public." Furthermore, any denial of access was only temporary; once the danger of prejudice had dissipated, a transcript of the suppression hearing was made available. Thus, any First and Fourteenth Amendment right of petitioner to attend criminal trials was not violated. Pp. 391–393.

43 N. Y. 2d 370, 372 N. E. 2d 544, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., *post*, p. 394, POWELL, J., *post*, p. 397, and REHNQUIST, J., *post*, p. 403, filed concurring opinions. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, *post*, p. 406.

Robert C. Bernius argued the cause for petitioner. With him on the briefs was *John Stuart Smith*.

Bernard Kobroff argued the cause and filed a brief for respondents.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The question presented in this case is whether members of the public have an independent constitutional right to insist upon access to a pretrial judicial proceeding, even though

*Briefs of *amici curiae* urging reversal were filed by *David Rudenstine*, *Bruce J. Ennis*, and *Joel M. Gora* for the American Civil Liberties Union et al.; by *Arthur B. Hanson*, *Frank M. Northam*, and *Richard M. Schmidt, Jr.*, for the American Newspaper Publishers Association et al.; and by *Anthony F. Essaye* for the Deadline Club, the New York City Chapter of the Society of Professional Journalists, Sigma Delta Chi, et al.

Briefs of *amici curiae* were filed by *E. Barrett Prettyman, Jr.*, and *Erwin Krasnow* for the Reporters Committee for Freedom of the Press et al.; and by *Floyd Abrams* for New York Times Co.

the accused, the prosecutor, and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial.

I

Wayne Clapp, aged 42 and residing at Henrietta, a Rochester, N. Y., suburb, disappeared in July 1976. He was last seen on July 16 when, with two male companions, he went out on his boat to fish in Seneca Lake, about 40 miles from Rochester. The two companions returned in the boat the same day and drove away in Clapp's pickup truck. Clapp was not with them. When he failed to return home by July 19, his family reported his absence to the police. An examination of the boat, laced with bulletholes, seemed to indicate that Clapp had met a violent death aboard it. Police then began an intensive search for the two men. They also began lake-dragging operations in an attempt to locate Clapp's body.

The petitioner, Gannett Co., Inc., publishes two Rochester newspapers, the morning Democrat & Chronicle and the evening Times-Union.[1] On July 20, each paper carried its first

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[1] The Democrat & Chronicle and the Times-Union are published in Rochester, N. Y. Rochester, in Monroe County, is approximately 40 miles from the Seneca County line. The circulation of the newspapers is primarily in Monroe County. There are some subscribers, however, in Seneca County. In 1976, when this case arose, the Democrat & Chronicle had a Seneca County daily circulation of 1,022, giving it a 9.6% share of the market in that county, and a Sunday circulation of 1,532, for a 14.3% share of the market. The Times-Union published only a daily edition and had but one subscriber in Seneca County. American Newspaper Markets, Inc., Circulation '77/'78, pp. 522, 541. The Bureau of the Census estimated Seneca County's 1976 population at 34,000. U. S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P–26, No. 76–32, Population Estimates 3 (Aug. 1977).

The petitioner in 1976 also owned a Rochester, N. Y., television station. And there were other newspapers in Seneca County at that time. See Circulation '77/'78, *supra*, at 522. The record in this case, however, contains no evidence concerning newspaper coverage of Clapp's disappearance

story about Clapp's disappearance. Each reported the few details that were then known and stated that the police were theorizing that Clapp had been shot on his boat and his body dumped overboard. Each stated that the body was missing. The Times-Union mentioned the names of respondents Greathouse and Jones and said that Greathouse "was identified as one of the two companions who accompanied Clapp Friday" on the boat; said that the two were aged 16 and 21, respectively; and noted that the police were seeking the two men and Greathouse's wife, also 16. Accompanying the evening story was a 1959 photograph of Clapp. The report also contained an appeal from the state police for assistance.

Michigan police apprehended Greathouse, Jones, and the woman on July 21. This came about when an interstate bulletin describing Clapp's truck led to their discovery in Jackson County, Mich., by police who observed the truck parked at a local motel. The petitioner's two Rochester papers on July 22 reported the details of the capture. The stories recounted how the Michigan police, after having arrested Jones in a park, used a helicopter and dogs and tracked down Greathouse and the woman in some woods. They recited that Clapp's truck was located near the park.

The stories also stated that Seneca County police theorized that Clapp was shot with his own pistol, robbed, and his body thrown into Seneca Lake. The articles provided background on Clapp's life, sketched the events surrounding his disappearance, and said that New York had issued warrants for the arrest of the three persons. One of the articles reported that the Seneca County District Attorney would seek to extradite the suspects and would attempt to carry through with a homicide prosecution even if Clapp's body were not found. The paper also quoted the prosecutor as stating, however, that

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and the subsequent prosecution of respondents Greathouse and Jones other than that which appeared in the Democrat & Chronicle and the Times-Union.

the evidence was still developing and "the case could change." The other story noted that Greathouse and Jones were from Texas and South Carolina, respectively.

Both papers carried stories on July 23. These revealed that Jones, the adult, had waived extradition and that New York police had traveled to Michigan and were questioning the suspects. The articles referred to police speculation that extradition of Greathouse and the woman might involve "legalities" because they were only 16 and considered juveniles in Michigan. The morning story provided details of an interview with the landlady from whom the suspects had rented a room while staying in Seneca County at the time Clapp disappeared. It also noted that Greathouse, according to state police, was on probation in San Antonio, Tex., but that the police did not know the details of his criminal record.

The Democrat & Chronicle carried another story on the morning of July 24. It stated that Greathouse had led the Michigan police to the spot where he had buried a .357 magnum revolver belonging to Clapp and that the gun was being returned to New York with the three suspects. It also stated that the police had found ammunition at the motel where Greathouse and the woman were believed to have stayed before they were arrested. The story repeated the basic facts known about the disappearance of Clapp and the capture of the three suspects in Michigan. It stated that New York police continued to search Seneca Lake for Clapp's body.

On July 25, the Democrat & Chronicle reported that Greathouse and Jones had been arraigned before a Seneca County Magistrate on second-degree murder charges shortly after their arrival from Michigan; that they and the woman also had been arraigned on charges of second-degree grand larceny; that the three had been committed to the Seneca County jail; that all three had "appeared calm" during the court session; and that the Magistrate had read depositions signed by three witnesses, one of whom testified to having heard "five or six

shots" from the lake on the day of the disappearance, just before seeing Clapp's boat "veer sharply" in the water.

Greathouse, Jones, and the woman were indicted by a Seneca County grand jury on August 2. The two men were charged, in several counts, with second-degree murder, robbery, and grand larceny. The woman was indicted on one count of grand larceny. Both the Democrat & Chronicle and the Times-Union on August 3 reported the filing of the indictments. Each story stated that the murder charges specified that the two men had shot Clapp with his own gun, had weighted his body with anchors and tossed it into the lake, and then had made off with Clapp's credit card, gun, and truck. Each reported that the defendants were held without bail, and each again provided background material with details of Clapp's disappearance. The fact that Clapp's body still had not been recovered was mentioned. One report noted that, according to the prosecutor, if the body were not recovered prior to trial, "it will be the first such trial in New York State history." Each paper on that day also carried a brief notice that a memorial service for Clapp would be held that evening in Henrietta. These notices repeated that Greathouse and Jones had been charged with Clapp's murder and that his body had not been recovered.

On August 6, each paper carried a story reporting the details of the arraignments of Greathouse and Jones the day before. The papers stated that both men had pleaded not guilty to all charges. Once again, each story repeated the basic facts of the accusations against the men and noted that the woman was arraigned on a larceny charge. The stories noted that defense attorneys had been given 90 days in which to file pretrial motions.

During this 90-day period, Greathouse and Jones moved to suppress statements made to the police. The ground they asserted was that those statements had been given involun-

tarily.[2] They also sought to suppress physical evidence seized as fruits of the allegedly involuntary confessions; the primary physical evidence they sought to suppress was the gun to which, as petitioner's newspaper had reported, Greathouse had led the Michigan police.

The motions to suppress came on before Judge DePasquale on November 4.[3] At this hearing, defense attorneys argued that the unabated buildup of adverse publicity had jeopardized the ability of the defendants to receive a fair trial. They thus requested that the public and the press be excluded from the hearing. The District Attorney did not oppose the motion. Although Carol Ritter, a reporter employed by the petitioner, was present in the courtroom, no objection was made at the time of the closure motion. The trial judge granted the motion.

The next day, however, Ritter wrote a letter to the trial judge asserting a "right to cover this hearing," and requesting that "we . . . be given access to the transcript." The judge responded later the same day. He stated that the suppression hearing had concluded and that any decision on immediate release of the transcript had been reserved. The petitioner then moved the court to set aside its exclusionary order.

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[2] Under N. Y. Crim. Proc. Law §§ 710.40 and 255.20 (McKinney Supp. 1978), a defendant was required to file in advance of trial any motion to suppress evidence. The statutes permitted a defendant to make such a motion for the first time during trial only when he did not have a reasonable opportunity to do so prior to trial, or when the State failed to provide notice before trial that it would seek to introduce a confession of the defendant. §§ 710.30 and 710.40.2.

[3] The hearing on the motion of defendants Greathouse and Jones to suppress their confessions as involuntary was held before trial in accordance with the decision in *People* v. *Huntley*, 15 N. Y. 2d 72, 204 N. E. 2d 179 (1965). In *Huntley*, the New York Court of Appeals ruled that the separate inquiry into the voluntariness of a confession, required by this Court's decision in *Jackson* v. *Denno*, 378 U. S. 368 (1964), was to be made in a preliminary hearing. 15 N. Y. 2d, at 78, 204 N. E. 2d, at 183.

The trial judge scheduled a hearing on this motion for November 16 after allowing the parties to file briefs. At this proceeding, the trial judge stated that, in his view, the press had a constitutional right of access although he deemed it "unfortunate" that no representative of the petitioner had objected at the time of the closure motion. Despite his acceptance of the existence of this right, however, the judge emphasized that it had to be balanced against the constitutional right of the defendants to a fair trial. After finding on the record that an open suppression hearing would pose a "reasonable probability of prejudice to these defendants," the judge ruled that the interest of the press and the public was outweighed in this case by the defendants' right to a fair trial. The judge thus refused to vacate his exclusion order or grant the petitioner immediate access to a transcript of the pretrial hearing.

The following day, an original proceeding in the nature of prohibition and mandamus, challenging the closure orders on First, Sixth, and Fourteenth Amendment grounds, was commenced by the petitioner in the Supreme Court of the State of New York, Appellate Division, Fourth Department. On December 17, 1976, that court held that the exclusionary orders transgressed the public's vital interest in open judicial proceedings and further constituted an unlawful prior restraint in violation of the First and Fourteenth Amendments. It accordingly vacated the trial court's orders. 55 App. Div. 2d 107, 389 N. Y. S. 2d 719 (1976).

On appeal, the New York Court of Appeals held that the case was technically moot[4] but, because of the critical importance of the issues involved, retained jurisdiction and reached the merits. The court noted that under state law,

[4] Shortly before the entry of judgment by the Appellate Division, both defendants had pleaded guilty to lesser included offenses in satisfaction of the charges against them. Immediately thereafter, a transcript of the suppression hearing was made available to the petitioner.

"[c]riminal trials are presumptively open to the public, including the press," but held that this presumption was overcome in this case because of the danger posed to the defendants' ability to receive a fair trial. Thus, the Court of Appeals upheld the exclusion of the press and the public from the pretrial proceeding. 43 N. Y. 2d 370, 372 N. E. 2d 544 (1977). Because of the significance of the constitutional questions involved, we granted certiorari. 435 U. S. 1006.

II

We consider, first, the suggestion of mootness, noted and rejected by the New York Court of Appeals. 43 N. Y. 2d, at 376, 372 N. E. 2d, at 547. We conclude that this aspect of the case is governed by *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546–547, and that the controversy is not moot. The petitioner, of course, has obtained access to the transcript of the suppression hearing. But this Court's jurisdiction is not defeated, *id.*, at 546, "simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.' *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911)." To meet that test, two conditions must be satisfied: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weirstein* v. *Bradford*, 423 U. S. 147, 149.

Those conditions have been met. The order closing a pretrial hearing is too short in its duration to permit full review. And to the extent the order has the effect of denying access to the transcript, termination of the underlying criminal proceeding by a guilty plea, as in this case, or by a jury verdict, nearly always will lead to a lifting of the order before appellate review is completed. The order is "by nature short-lived." *Nebraska Press, supra*, at 547. Further, it is reasonably to

be expected that the petitioner, as publisher of two New York newspapers, will be subjected to similar closure orders entered by New York courts in compliance with the judgment of that State's Court of Appeals. We therefore turn to the merits.

III

This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial. *E. g., Sheppard* v. *Maxwell,* 384 U. S. 333; *Irvin* v. *Dowd,* 366 U. S. 717; *Marshall* v. *United States,* 360 U. S. 310. Cf. *Estes* v. *Texas,* 381 U. S. 532. To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. *Sheppard* v. *Maxwell, supra.* And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.

Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. Cf. *Jackson* v. *Denno,* 378 U. S. 368. Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.

The danger of publicity concerning pretrial suppression hearings is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of the trial. After the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means.[5] When such information is publicized during a pre-

[5] In addition to excluding inadmissible evidence, a trial judge may order sequestration of the jury or take any of a variety of protective measures.

trial proceeding, however, it may never be altogether kept from potential jurors. Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun. Cf. *Rideau* v. *Louisiana*, 373 U. S. 723.[6]

IV

A

The Sixth Amendment, applicable to the States through the Fourteenth, surrounds a criminal trial with guarantees such as the rights to notice, confrontation, and compulsory process that have as their overriding purpose the protection of the accused from prosecutorial and judicial abuses.[7] Among the guarantees that the Amendment provides to a person charged with the commission of a criminal offense, and to him alone, is the "right to a speedy and public trial, by an impartial jury." The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guar-

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See *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 562–565; *Sheppard* v. *Maxwell*, 384 U. S. 333, 358–362.

[6] All of this does not mean, of course, that failure to close a pretrial hearing, or take other protective measures to minimize the impact of prejudicial publicity, will warrant the extreme remedy of reversal of a conviction. But it is precisely because reversal is such an extreme remedy, and is employed in only the rarest cases, that our criminal justice system permits, and even encourages, trial judges to be overcautious in ensuring that a defendant will receive a fair trial.

[7] The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

antee, like the others enumerated, is personal to the accused. See *Faretta* v. *California*, 422 U. S. 806, 848 ("[T]he specific guarantees of the Sixth Amendment are personal to the accused") (BLACKMUN, J., dissenting).

Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant. In *In re Oliver*, 333 U. S. 257, this Court held that the secrecy of a criminal contempt trial violated the accused's right to a public trial under the Fourteenth Amendment. The right to a public trial, the Court stated, "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.*, at 270. In an explanatory footnote, the Court stated that the public-trial guarantee

> ". . . 'is for the protection of all persons accused of crime—the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule [as to public trials] must be observed and applied to all.' Frequently quoted is the statement in [1] Cooley, Constitutional Limitations (8th ed. 1927) at 647: 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .'" *Id.*, at 270 n. 25.[8]

Similarly, in *Estes* v. *Texas*, *supra*, the Court held that a defendant was deprived of his right to due process of law under the Fourteenth Amendment by the televising and

[8] The Court also recognized that while the right to a public trial is guaranteed to an accused, publicity also provides various benefits to the public. 333 U. S., at 270 n. 24.

broadcasting of his trial. In rejecting the claim that the media representatives had a constitutional right to televise the trial, the Court stated that "[t]he purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned." 381 U. S., at 538–539. See also *id.*, at 588 ("Thus the right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered") (Harlan, J., concurring); *id.*, at 583 ("[T]he public trial provision of the Sixth Amendment is a 'guarantee to an accused' . . . [and] a necessary component of an accused's right to a fair trial . . .") (Warren, C. J., concurring).

Thus, both the *Oliver* and *Estes* cases recognized that the constitutional guarantee of a public trial is for the benefit of the defendant. There is not the slightest suggestion in either case that there is any correlative right in members of the public to insist upon a public trial.[9]

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[9] Numerous commentators have also recognized that only a defendant has a right to a public trial under the Sixth Amendment. *E. g.*, Radin, The Right to a Public Trial, 6 Temple L. Q. 381, 392 (1932) (a public right to a public trial "cannot be derived from the Constitution because the Constitution certainly does not mention a public trial as the privilege of the public, but expressly as that of the accused"); Boldt, Should Canon 35 Be Amended?, 41 A. B. A. J. 55, 56 (1955) ("[T]he guarantee of public trial is for the benefit of persons charged with crime . . . . It is significant that the Constitution does *not* say that the public has the right to 'enjoy' or even attend trials. There is nothing in the constitutional language indicating that any individual other than the accused in a criminal trial . . . [has] either a right to attend the trial or to publicity emanating from the trial"); Note, The Right to Attend Criminal Hearings, 78 Colum. L. Rev. 1308, 1321 (1978) (since the Sixth Amendment confers a right to a public trial to the accused, "to elaborate a parallel and possibly adverse public right of access from the public trial guarantee clause strains even flexible constitutional language beyond its proper bounds"); Note, The Right to a Public Trial in Criminal Cases, 41 N. Y. U. L. Rev. 1138, 1156 (1966) ("Despite the importance of the public's *interest*, however, it does not appear that a public *right* is 'so rooted in the traditions and

B

While the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial. "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Singer* v. *United States*, 380 U. S. 24, 34–35.[10] But the issue here is not whether the defendant can compel a private trial.[11] Rather, the issue

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conscience of our people as to be ranked as fundamental,' . . . particularly in view of the uncertain status of this right in the majority of the state courts").

See also Powell, The Right to a Fair Trial, 51 A. B. A. J. 534, 538 (1965) ("We must bear in mind that the primary purpose of a public trial and of the media's right as a part of the public to attend and report what occurs there is to protect the accused"); 1 T. Cooley, Constitutional Limitations 647 (8th ed. 1927) ("The requirement of a public trial is for the benefit of the accused . . .").

It appears that before today, only one court, state or federal, has ever held that the Sixth and Fourteenth Amendments confer upon members of the public a right of access to a criminal trial. *United States* v. *Cianfrani*, 573 F. 2d 835 (CA3 1978). The *Cianfrani* case has been criticized for its departure from the plain meaning of the Sixth Amendment. See Note, 78 Colum. L. Rev., at 1321–1322.

[10] In *Faretta* v. *California*, 422 U. S. 806, by contrast, the Court held that the Sixth and Fourteenth Amendments guarantee that an accused has a right to proceed without counsel in a criminal case when he voluntarily and intelligently elects to do so. In reaching this result, the Court relied on the language and structure of the Sixth Amendment which grants to the accused the right to make a defense. As part of this right to make a defense, the Amendment speaks of the "assistance" of counsel, thus contemplating a norm in which the accused, and not a lawyer, is master of his own defense. *Id.*, at 819–820.

[11] The question in this case is not, as the dissenting opinion repeatedly suggests, *post*, at 411, 415, 418, 425, 426, whether the Sixth and Fourteenth Amendments give a defendant the right to compel a secret trial. In this case the defendants, the prosecutor, and the judge all agreed that closure of the pretrial suppression hearing was necessary to protect the defendants' right to a fair trial. Moreover, a transcript of the proceedings was made available to the public. Thus, there is no need to decide the question

is whether members of the public have an enforceable right to a public trial that can be asserted independently of the parties in the litigation.

There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system. *Estes* v. *Texas*, 381 U. S., at 583 (Warren, C. J., concurring). But there is a strong societal interest in other constitutional guarantees extended to the accused as well. The public, for example, has a definite and concrete interest in seeing that justice is swiftly and fairly administered. See *Barker* v. *Wingo*, 407 U. S. 514, 519. Similarly, the public has an interest in having a criminal case heard by a jury, an interest distinct from the defendant's interest in being tried by a jury of his peers. *Patton* v. *United States*, 281 U. S. 276, 312.

Recognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry, however, from the creation of a constitutional right on the part of the public. In an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation. Thus, because of the great public interest in jury trials as the preferred mode of fact-finding in criminal cases, a defendant cannot waive a jury trial without the consent of the prosecutor and judge. *Singer* v. *United States*, *supra*, at 38; *Patton* v. *United States*, *supra*, at 312. But if the defendant waives his right to a jury trial,

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framed by the dissenting opinion. If that question were presented, it is clear that the defendant would have no such right. See *Singer* v. *United States*, 380 U. S. 24, 35 ("[A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial").

and the prosecutor and the judge consent, it could hardly be seriously argued that a member of the public could demand a jury trial because of the societal interest in that mode of fact-finding. Cf. Fed. Rule Crim. Proc. 23 (a) (trials to be by jury unless waived by a defendant, but the court must approve and the prosecution must consent to the waiver). Similarly, while a defendant cannot convert his right to a speedy trial into a right to compel an indefinite postponement, a member of the general public surely has no right to prevent a continuance in order to vindicate the public interest in the efficient administration of justice. In short, our adversary system of criminal justice is premised upon the proposition that the public interest is fully protected by the participants in the litigation.[12]

V

In arguing that members of the general public have a constitutional right to attend a criminal trial, despite the obvious lack of support for such a right in the structure or text of the Sixth Amendment, the petitioner and *amici* rely on the history of the public-trial guarantee. This history, however, ultimately demonstrates no more than the existence of a common-law rule of open civil and criminal proceedings.

A

Not many common-law rules have been elevated to the status of constitutional rights. The provisions of our Consti-

[12] The Court has recognized that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law . . . ." *Berger* v. *United States*, 295 U. S. 78, 88. The responsibility of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial. But this responsibility also requires him to be sensitive to the due process rights of a defendant to a fair trial. *A fortiori*, the trial judge has the same dual obligation.

tution do reflect an incorporation of certain few common-law rules and a rejection of others. The common-law right to a jury trial, for example, is explicitly embodied in the Sixth and Seventh Amendments. The common-law rule that looked upon jurors as interested parties who could give evidence against a defendant [13] was explicitly rejected by the Sixth Amendment provision that a defendant is entitled to be tried by an "impartial jury." But the vast majority of common-law rules were neither made part of the Constitution nor explicitly rejected by it.

Our judicial duty in this case is to determine whether the common-law rule of open proceedings was incorporated, rejected, or left undisturbed by the Sixth Amendment. In pursuing this inquiry, it is important to distinguish between what the Constitution permits and what it requires. It has never been suggested that by phrasing the public-trial guarantee as a right of the accused, the Framers intended to reject the common-law rule of open proceedings. There is no question that the Sixth Amendment permits and even presumes open trials as a norm. But the issue here is whether the Constitution *requires* that a pretrial proceeding such as this one be opened to the public, even though the participants in the litigation agree that it should be closed to protect the defendants' right to a fair trial.[14] The history upon which the petitioner and *amici* rely totally fails to demonstrate that the Framers of the Sixth Amendment intended to create a constitutional right in strangers to attend a pretrial proceeding,

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[13] Blackstone, for example, stated that it "universally obtains" that if a juror knows of a matter in issue, he may "give his evidence publicly in court." 3 W. Blackstone, Commentaries *375.

[14] Thus, it is not enough to say, in the words of the dissenting opinion, that there is no "evidence that casting the public-trial concept in terms of a right of the accused signaled a departure from the common-law practice," *post*, at 425, and that "there is no indication that the First Congress, in proposing what became the Sixth Amendment, meant to depart from the common-law practice . . . ." *Post*, at 426.

when all that they actually did was to confer upon the accused an explicit right to demand a public trial.[15] In conspicuous contrast with some of the early state constitutions that pro-

[15] An additional problem with the historical analysis of the petitioner and *amici* is that it is equally applicable to civil and criminal cases and therefore proves too much. For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered in civil *as well as* criminal matters" (emphasis added). Remarks upon Mr. Cornish's Trial, 11 How. St. Tr. 455, 460. English commentators also assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two. *E. g.*, 2 E. Coke, Institutes of the Laws of England 103 (6th ed. 1681) ("all Causes ought to be heard . . . openly in the Kings Courts"); 3 W. Blackstone, Commentaries *372; M. Hale, The History of the Common Law of England 343, 345 (6th ed. 1820); E. Jenks, The Book of English Law 73–74 (6th ed. 1967).

The experience in the American Colonies was analogous. From the beginning, the norm was open trials. Indeed, the 1677 New Jersey Constitution provided that any person could attend a trial whether it was "civil *or* criminal," Concessions and Agreements of West New Jersey (1677), ch. XXIII, quoted in 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971) (emphasis added). Similarly, the 1682 and 1776 Pennsylvania Constitutions both provided that *"all* courts shall be open," 1 Schwartz, *supra*, at 140, 271 (emphasis added).

If the existence of a common-law rule were the test for whether there is a Sixth Amendment public right to a public trial, therefore, there would be such a right in civil as well as criminal cases. But the Sixth Amendment does not speak in terms of civil cases at all; by its terms it is limited to providing rights to an accused in criminal cases. In short, there is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than the text and structure of the Constitution.

Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. *E. g.*, *Dred Scott* v. *Sandford*, 19 How. 393; *Plessy* v. *Ferguson*, 163 U. S. 537; *Brown* v. *Board of Education*, 347 U. S. 483; *University of California Regents* v. *Bakke*, 438 U. S. 265. Thus, in some civil cases the public interest in access, and the salutary

vided for a public right to open civil and criminal trials,[16] the Sixth Amendment confers the right to a public trial only upon a defendant and only in a criminal case.

B

But even if the Sixth and Fourteenth Amendments could properly be viewed as embodying the common-law right of the public to attend criminal trials, it would not necessarily follow that the petitioner would have a right of access under the circumstances of this case. For there exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed, there is substantial evidence to the contrary.[17] By the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant.[18] And pretrial proceedings,

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effect of publicity, may be as strong as, or stronger than, in most criminal cases.

[16] See n. 15, *supra*.

[17] Although pretrial suppression hearings were unknown at common law, other preliminary hearings were formalized by statute as early as 1554 and 1555. 1 & 2 Phil. & M., ch. 13 (1554); 2 & 3 Phil. & M., ch. 10 (1555).

[18] After the abolition of the Star Chamber in 1641, defendants in criminal cases began to acquire many of the rights that are presently embodied in the Sixth Amendment. Thus, the accused now had the right to confront witnesses, call witnesses in his own behalf, and generally the right to a fair trial as we now know it. It was during this period that the public trial first became identified as a right of the accused. As one commentator has stated:

"The public trial, although it had always been the custom, acquired new significance. It gave the individual protection against being denied any of his other fundamental rights. A public trial would make it difficult for a judge to abuse a jury or the accused. Any such abuses would cause much public indignation. Thus, it must have seemed implicit that the public trial was as much an essential element of a fair trial as any of the newer conventions." Note, Legal History: Origins of the Public Trial, 35 Ind. L. J. 251, 255 (1960).

It was during this period that we first find defendants demanding a public trial. See, *The Trial of John Lilburne*, 4 How. St. Tr. 1270, 1273

precisely because of the same concern for a fair trial, were never characterized by the same degree of openness as were actual trials.[19]

(1649), in which Lilburne, on trial for treason, referred to a public trial as "the first fundamental liberty of an Englishman." Indeed, the fact that the Framers guaranteed to an accused the right to a public trial in the same Amendment that contains the other fair-trial rights of an accused also suggests that open trials were by then clearly associated with the rights of a defendant.

[19] Even with respect to trials themselves, the tradition of publicity has not been universal. Exclusion of some members of the general public has been upheld, for example, in cases involving violent crimes against minors. *Geise* v. *United States*, 262 F. 2d 151 (CA9 1958). The public has also been temporarily excluded from trials during testimony of certain witnesses. *E. g.*, *Beauchamp* v. *Cahill*, 297 Ky. 505, 180 S. W. 2d 423 (1944) (exclusion justified when children forced to testify to revolting facts); *State* v. *Callahan*, 100 Minn. 63, 110 N. W. 342 (1907) (exclusion justified when embarrassment could prevent effective testimony); *Hogan* v. *State*, 191 Ark. 437, 86 S. W. 2d 931 (1935) (trial judge properly closed trial to spectators during testimony of 10-year-old rape victim); *United States ex rel. Smallwood* v. *LaValle*, 377 F. Supp. 1148 (EDNY), aff'd, 508 F. 2d 837 (1974). Exclusion has also been permitted when the evidence in a case was expected to be obscene. *State* v. *Croak*, 167 La. 92, 118 So. 703 (1928). Finally, trial judges have been given broad discretion to exclude spectators to protect order in their courtrooms. *United States ex rel. Orlando* v. *Fay*, 350 F. 2d 967 (CA2 1965) (exclusion of general public justified after an outburst in court by defendant and his mother).

Approximately half the States also have statutory provisions containing limitations upon public trials. *E. g.*, Ala. Code § 12–21–202 (1975) (public can be excluded in rape cases); Ga. Code § 81–1006 (1978) (public can be excluded where evidence is vulgar); Mass. Gen. Laws Ann., ch. 278, § 16A (West 1972) (general public can be excluded from all trials of designated crimes); Minn. Stat. § 631.04 (1978) (no person under 17 who is not a party shall be present in a criminal trial); Va. Code § 19.2–266 (1975) ("In the trial of all criminal cases . . . the court may, in its discretion, exclude . . . any persons whose presence would impair the conduct of a fair trial . . .").

The petitioner and *amici* appear to argue that since exclusion of members of the public is relatively rare, there must be a constitutional public

Under English common law, the public had no right to attend pretrial proceedings. *E. g.*, E. Jenks, The Book of English Law 75 (6th ed. 1967) ("It must, of course, be remembered, that the principle of publicity only applies to the actual trial of a case, not necessarily to the preliminary or prefatory stages of the proceedings . . ."); F. Maitland, Justice and Police 129 (1885) (The "preliminary examination of accused persons has gradually assumed a very judicial form . . . . The place in which it is held is indeed no 'open court,' the public can be excluded if the magistrate thinks that the ends of justice will thus be best answered . . ."). See also Indictable Offences Act, 11 & 12 Vict., ch. 42, § 19 (1848) (providing that pretrial proceedings should not be deemed an open court and that the public could therefore be excluded); Magistrates' Courts Act, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 55, § 4 (2) (1952) (same).[20]

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right to a public trial. This argument, however, confuses the existence of a constitutional right with the common-law tradition of open civil and criminal proceedings. See n. 15, *supra*. This common-law tradition, coupled with the explicit right of the accused to a public trial in criminal cases, fully explains the general prevalence of open trials.

[20] Similarly, the press had no privilege for the reporting of pretrial judicial proceedings under English common law. Thus in the well-known case of *King* v. *Fisher*, 2 Camp. 563, 170 Eng. Rep. 1253 (N. P. 1811), the court forbade the dissemination of information about a pretrial hearing to protect the right of the accused to receive a fair trial. In distinguishing between the privilege accorded the reporting of trials, and the absence of such a privilege of reporting pretrial proceedings, Lord Ellenborough declared:

"If any thing is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. . . . Trials at law, fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. . . . But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the

Closed pretrial proceedings have been a familiar part of the judicial landscape in this country as well. The original New York Field Code of Criminal Procedure published in 1850, for example, provided that pretrial hearings should be closed to the public "upon the request of a defendant." [21] The explanatory report made clear that this provision was designed to protect defendants from prejudicial pretrial publicity:

> "If the examination must necessarily be public, the consequence may be that the testimony upon the mere preliminary examination will be spread before the community, and a state of opinion created, which, in cases of great public interest, will render it difficult to obtain an unprejudiced jury. The interests of justice require that the case of the defendant should not be prejudged, if it can be avoided; and no one can justly complain, that until he is put upon his trial, the dangers of this prejudgment are obviated." [22]

Indeed, eight of the States that have retained all or part of the

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law still presumes to be innocent, and to poison the sources of justice." *Id.*, at 570–571, 170 Eng. Rep., at 1255.

See also *King* v. *Parke*, [1903] 2 K. B. 432, 438.

Restrictions of public access and reporting of pretrial proceedings did not involve suppression hearings because such hearings did not exist in early common law. But the rationale for the lack of a public right of access to pretrial judicial proceedings—protection of the right of the accused to a fair trial—is equally applicable to pretrial suppression hearings. Indeed, the entire purpose of a pretrial suppression hearing is to ensure that the accused will not be unfairly convicted by contaminated evidence.

[21] Commissioners on Practice and Pleadings, Code of Criminal Procedure, § 202 (Final Report 1850).

[22] *Id.*, at 94. To protect a defendant's right to a public trial, however, closure could be ordered only at the request of the defendant:

"To guard the rights of the defendant against a secret examination, the section provides that it shall not be conducted in private, unless at his request." *Id.*, at 95.

Field Code have kept the explicit provision relating to closed pretrial hearings.[23]

For these reasons, we hold that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.

VI

The petitioner also argues that members of the press and the public have a right of access to the pretrial hearing by reason of the First and Fourteenth Amendments. In *Pell* v. *Procunier*, 417 U. S. 817, *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, and *Houchins* v. *KQED, Inc.*, 438 U. S. 1, this Court upheld prison regulations that denied to members of the press access to prisons superior to that afforded to the public generally. Some Members of the Court, however, took the position in those cases that the First and Fourteenth Amendments do guarantee to the public in general, or the press in

[23] Ariz. Rule Crim. Proc. 9.3; Cal. Penal Code Ann. § 868 (West 1970); Idaho Code § 19–811 (1979); Iowa Code § 761.13 (1973); Mont. Code Ann. § 46–10–201 (1978); Nev. Rev. Stat. § 171.204 (1975); N. D. Cent. Code § 29–07–14 (1974); Utah Code Ann. § 77–15–13 (1978). Other States have similar provisions. *E. g.*, Pa. Rule Crim. Proc. 323 (f) (providing that suppression hearings shall be open "unless defendant moves that it be held in the presence of only the defendant, counsel for the parties, court officers and necessary witnesses"). Still other States allow closure of pretrial hearings without statutory authorization. *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 568.

Until a year ago, the American Bar Association also endorsed the view that presiding officers should close pretrial hearings at the request of a defendant unless there was no "substantial likelihood" that the defendant would be prejudiced by an open proceeding. ABA Project on Standards for Criminal Justice, Fair Trial and Free Press § 3.1 (App. Draft 1968). The ABA, following the "approach taken by the Supreme Court in *Nebraska Press Association* v. *Stuart*," has now changed this standard. ABA Project on Standards for Criminal Justice, Fair Trial and Free Press, Standard 8–3.2, p. 16 (App. Draft 1978). The *Nebraska Press* case, however, is irrelevant to the question presented here. See n. 25, *infra*.

particular, a right of access that precludes their complete exclusion in the absence of a significant governmental interest. See *Saxbe, supra,* at 850 (POWELL, J., dissenting); *Houchins, supra,* at 19 (STEVENS, J., dissenting). See also *id.,* at 16 (STEWART, J., concurring).

The petitioner in this case urges us to narrow our rulings in *Pell, Saxbe,* and *Houchins* at least to the extent of recognizing a First and Fourteenth Amendment right to attend criminal trials.[24] We need not decide in the abstract, however, whether there is any such constitutional right. For even assuming, *arguendo,* that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case.

Several factors lead to the conclusion that the actions of the trial judge here were consistent with any right of access the petitioner may have had under the First and Fourteenth Amendments. First, none of the spectators present in the courtroom, including the reporter employed by the petitioner, objected when the defendants made the closure motion. Despite this failure to make a contemporaneous objection, counsel for the petitioner was given an opportunity to be heard at a proceeding where he was allowed to voice the petitioner's objections to closure of the pretrial hearing. At this proceeding, which took place after the filing of briefs, the trial court balanced the "constitutional rights of the press and the public" against the "defendants' right to a fair trial." The trial judge concluded after making this appraisal that the press and the public could be excluded from the suppression hearing and could be denied immediate access to a transcript,

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[24] The petitioner argues that trials have traditionally been open to the public, in contrast to prisons from which the public has been traditionally excluded. We need not decide in this case whether this factual difference is of any constitutional significance.

because an open proceeding would pose a "reasonable probability of prejudice to these defendants." Thus, the trial court found that the representatives of the press did have a right of access of constitutional dimension, but held, under the circumstances of this case, that this right was outweighed by the defendants' right to a fair trial. In short, the closure decision was based "on an assessment of the competing societal interests involved . . . rather than on any determination that First Amendment freedoms were not implicated." *Saxbe, supra,* at 860 (POWELL, J., dissenting).

Furthermore, any denial of access in this case was not absolute but only temporary. Once the danger of prejudice had dissipated, a transcript of the suppression hearing was made available. The press and the public then had a full opportunity to scrutinize the suppression hearing. Unlike the case of an absolute ban on access, therefore, the press here had the opportunity to inform the public of the details of the pretrial hearing accurately and completely. Under these circumstances, any First and Fourteenth Amendment right of the petitioner to attend a criminal trial was not violated.[25]

VII

We certainly do not disparage the general desirability of open judicial proceedings. But we are not asked here to de-

[25] This Court's decision in *Nebraska Press Assn.* v. *Stuart, supra,* is of no assistance to the petitioner in this case. The *Nebraska Press* case involved a direct prior restraint imposed by a trial judge on the members of the press, prohibiting them from disseminating information about a criminal trial. Since "it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication," *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 713, the Court held that the order violated the constitutional guarantee of a free press. See also *Oklahoma Publishing Co.* v. *District Court,* 430 U. S. 308. The exclusion order in the present case, by contrast, did not prevent the petitioner from publishing any information in its possession. The proper inquiry, therefore, is whether the petitioner was denied any constitutional right of access.

clare whether open proceedings represent beneficial social policy, or whether there would be a constitutional barrier to a state law that imposed a stricter standard of closure than the one here employed by the New York courts. Rather, we are asked to hold that the Constitution itself gave the petitioner an affirmative right of access to this pretrial proceeding, even though all the participants in the litigation agreed that it should be closed to protect the fair-trial rights of the defendants.

For all of the reasons discussed in this opinion, we hold that the Constitution provides no such right. Accordingly, the judgment of the New York Court of Appeals is affirmed.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court, but I write separately to emphasize my view of the nature of the proceeding involved in today's decision. By definition, a hearing on a motion before trial to suppress evidence is not a *trial;* it is a *pre*trial hearing.

The Sixth Amendment tells us that "[i]n all criminal prosecutions, the *accused* shall enjoy the right to a . . . public trial." (Emphasis supplied.) It is the practice in Western societies, and has been part of the common-law tradition for centuries, that trials generally be public. This is an important prophylaxis of the system of justice that constitutes the adhesive element of our society. The public has an interest in observing the performance not only of the litigants and the witnesses, but also of the advocates and the presiding judge. Similarly, if the accused testifies, there is a proper public interest in that testimony. But interest alone does not create a constitutional right.

At common law there was a very different presumption for proceedings which preceded the trial. There was awareness of the untoward effects that could result from the publication

of information before an indictment was returned or before a person was bound over for trial. For an example we need only consider the case of *Daubney* v. *Cooper,* 5 M. & R. 314 (K. B. 1829), which involved a suit for trespass against a judge for forcing a person out of a courtroom. The argument concentrated on whether a defendant was entitled to be represented by counsel. But the following exchange on appeal illustrates the distinction drawn between trials and *pre*trial proceedings:

> (Counsel) ". . . The decision in *Cox* v. *Coleridge* proceeded on the ground that what had taken place before the magistrates, was merely a preliminary inquiry. The decision proceeded entirely upon that ground. The Court pointed out the inconvenience which would result from giving *publicity* to such previous inquiry."
>
> Bayley, J. (interrupting) ". . . I believe that in that case a distinction was taken between a *preliminary* inquiry and an inquiry upon which there may be a *conviction.*"
>
> (Counsel continued) ". . . Lord *Tenterden* there says, 'This being only a *preliminary* inquiry and not a *trial,* makes, in my mind, *all the difference.*'"* (Emphasis in original.)
>
> Parke, J. (interrupting) ". . . The decision in *Cox* v. *Coleridge* turned upon its being a case of preliminary inquiry." *Id.,* at 316, 318.

In sum, at common law, the courts recognized that the timing of a proceeding was likely to be critical.

When the Sixth Amendment was written, and for more than

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*The full quotation was: "It [the proceeding] is only a preliminary inquiry, whether there be sufficient ground to commit the prisoner for trial. The proceeding before the grand jury is precisely of the same nature, and it would be difficult, if the right exists in the present case, to deny it in that. This being only a preliminary inquiry, and not a trial, makes, in my mind, all the difference." *Cox* v. *Coleridge,* 1 B. & C. 37, 49–50, 107 Eng. Rep. 15, 19–20 (1822).

a century after that, no one could have conceived that the exclusionary rule and pretrial motions to suppress evidence would be part of our criminal jurisprudence. The authors of the Constitution, imaginative, farsighted, and perceptive as they were, could not conceivably have anticipated the paradox inherent in a judge-made rule of evidence that excludes undoubted truth from the truthfinding processes of the adversary system. Nevertheless, as of now, we are confronted not with a legal theory but with the reality of the unique strictures of the exclusionary rule, and they must be taken into account in this setting. To make public the evidence developed in a motion to suppress evidence, cf. *Brewer* v. *Williams*, 430 U. S. 387 (1977), would, so long as the exclusionary rule is not modified, introduce a new dimension to the problem of conducting fair trials.

Even though the draftsmen of the Constitution could not anticipate the 20th-century pretrial proceedings to suppress evidence, pretrial proceedings were not wholly unknown in that day. Written interrogatories were used pretrial in 18th-century litigation, especially in admiralty cases. Thus, it is safe to assume that those lawyers who drafted the Sixth Amendment were not unaware that some testimony was likely to be recorded before trials took place. Yet, no one ever suggested that there was any "right" of the public to be present at such pretrial proceedings as were available in that time; until the trial it could not be known whether and to what extent the pretrial evidence would be offered or received.

Similarly, during the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence. Pretrial depositions are not uncommon to take the testimony of a witness, either for the defense or

for the prosecution. In the entire pretrial period, there is no certainty that a trial will take place. Something in the neighborhood of 85 percent of all criminal charges are resolved by guilty pleas, frequently after pretrial depositions have been taken or motions to suppress evidence have been ruled upon.

For me, the essence of all of this is that by definition "pretrial proceedings" are exactly that.

MR. JUSTICE POWELL, concurring.

Although I join the opinion of the Court, I would address the question that it reserves. Because of the importance of the public's having accurate information concerning the operation of its criminal justice system, I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing.[1] As I have argued in *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting), this constitutional protection derives, not from any special status of members of the press as such, but rather

[1] In the present case, members of the press and public were excluded from a pretrial suppression hearing, rather than from the trial itself. In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome of the case. Indeed, in this case there was no trial as, following the suppression hearing, plea bargaining occurred that resulted in guilty pleas. In view of the special significance of a suppression hearing, the public's interest in this proceeding often is comparable to its interest in the trial itself. It is to be emphasized, however, that not all of the incidents of pretrial and trial are comparable in terms of public interest and importance to a formal hearing in which the question is whether critical, if not conclusive, evidence is to be admitted or excluded. In the criminal process, there may be numerous arguments, consultations, and decisions, as well as depositions and interrogatories, that are not central to the process and that implicate no First Amendment rights. And, of course, grand jury proceedings traditionally have been held in strict confidence. See *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 34–35 (1978) (STEVENS, J., dissenting).

because "[i]n seeking out the news the press . . . acts as an agent of the public at large," each individual member of which cannot obtain for himself "the information needed for the intelligent discharge of his political responsibilities." *Id.*, at 863. Cf. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776–778 (1978).

The right of access to courtroom proceedings, of course, is not absolute. It is limited both by the constitutional right of defendants to a fair trial, see, *e. g.*, *Estes* v. *Texas*, 381 U. S. 532 (1965), and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informants. Cf. *Procunier* v. *Martinez*, 416 U. S. 396, 412–413 (1974); *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 34–35 (1978) (STEVENS, J., dissenting); *Saxbe* v. *Washington Post Co.*, *supra*, at 872–873 (dissenting opinion). The task of determining the application of these limitations in each individual trial necessarily falls almost exclusively upon the trial court asked to exclude members of the press and public from the courtroom. For it would be entirely impractical to require criminal proceedings to cease while appellate courts were afforded an opportunity to review a trial court's decision to close proceedings. It is all the more important, therefore, that this Court identify for the guidance of trial courts the constitutional standard by which they are to judge whether closure is justified, and the minimal procedure by which this standard is to be applied.[2]

In cases such as this, where competing constitutional rights must be weighed in the context of a criminal trial,

[2] Contrary to MR. JUSTICE REHNQUIST's suggestion, *post*, at 405, lower courts cannot assume after today's decision that they are "free to determine for themselves the question whether to open or close the proceeding" free from all constitutional constraint. For although I disagree with my four dissenting Brethren concerning the origin and the scope of the constitutional limitations on the closing of pretrial proceedings, I agree with their conclusion that there are limitations and that they require the careful attention of trial courts before closure can be ordered.

the often difficult question is whether unrestrained exercise of First Amendment rights poses a serious danger to the fairness of a defendant's trial. "As we stressed in *Estes*, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged." *Sheppard* v. *Maxwell*, 384 U. S. 333, 358 (1966) (footnote omitted); see *Estes* v. *Texas*, *supra*, at 539. In striking this balance there are a number of considerations to be weighed. In *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), we concluded that there is a strong presumption against prohibiting members of the press from publishing information already in their possession concerning courtroom proceedings. Excluding all members of the press from the courtroom, however, differs substantially from the "gag order" at issue in *Nebraska Press*, as the latter involved a classic prior restraint, "one of the most extraordinary remedies known to our jurisprudence," *id.*, at 562, and applied to information irrespective of its source. In the present case, on the other hand, we are confronted with a trial court's order that in effect denies access only to one, albeit important, source. It does not in any way tell the press what it may and may not publish.

Despite these differences between *Nebraska Press* and the present case, petitioner asks the Court to impose a severe burden upon defendants seeking closure. The approach taken in MR. JUSTICE BLACKMUN'S opinion would grant this request, limiting closure to those cases where "it is strictly and inescapably necessary in order to protect the fair-trial guarantee." See *post*, at 440. It is difficult to imagine a case where closure could be ordered appropriately under this standard. A rule of such apparent inflexibility could prejudice defendants' rights and disserve society's interest in the fair and prompt disposition of criminal trials. As a result of pretrial publicity, defendants could be convicted after less than the meticulously fair trial that the Constitution demands. There

also could be an increase in reversal of convictions on appeal. In either event, it seems to me that the approach suggested by petitioner would not adequately safeguard the defendant's right to a fair trial, a right of equal constitutional significance to the right of access. The better course would be a more flexible accommodation between First and Sixth Amendment rights which are protected from state-law interference by the Fourteenth Amendment—an accommodation under which neither defendants' rights nor the rights of members of the press and public should be made subordinate. Cf. *Branzburg* v. *Hayes*, 408 U. S. 665, 709–710 (1972) (POWELL, J., concurring). The question for the trial court, therefore, in considering a motion to close a pretrial suppression hearing is whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury.

Although the strict standard of *Nebraska Press* is not applicable to decisions concerning closure of courtroom proceedings, much of the discussion in that case of the factors to be considered in making decisions with respect to "gag orders" is relevant to closure decisions. Thus, where a defendant requests the trial court to exclude the public, it should consider whether there are alternative means reasonably available by which the fairness of the trial might be preserved without interfering substantially with the public's interest in prompt access to information concerning the administration of justice. Similarly, because exclusion is justified only as a protection of the defendant's right to a fair trial and the State's interest in confidentiality, members of the press and public objecting to the exclusion have the right to demand that it extend no farther than is likely to achieve these goals. Thus, for example, the trial court should not withhold the transcript of closed courtroom proceedings past the time when no prejudice is likely to result to the defendant or the State from its release.

It is not enough, however, that trial courts apply a certain

standard to requests for closure. If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion. But this opportunity extends no farther than the persons actually present at the time the motion for closure is made, for the alternative would require substantial delays in trial and pretrial proceedings while notice was given to the public. Upon timely objection to the granting of the motion, it is incumbent upon the trial court to afford those present a reasonable opportunity to be heard on the question whether the defendant is likely to be deprived of a fair trial if the press and public are permitted to remain in attendance. At this hearing, it is the defendant's responsibility as the moving party to make some showing that the fairness of his trial likely will be prejudiced by public access to the proceedings. Similarly, if the State joins in the closure request, it should be given the opportunity to show that public access would interfere with its interests in fair proceedings or preserving the confidentiality of sensitive information. On the other hand, members of the press and public who object to closure have the responsibility of showing to the court's satisfaction that alternative procedures are available that would eliminate the dangers shown by the defendant and the State.

The question, then, is whether the First Amendment right of access outlined above was adequately respected in the present case. As the Court notes, the reporter ordered from the courtroom upon the motion of the defendants did not object to the closure order until the suppression hearing was all but completed. Petitioner's right to be heard on the question of closure, therefore, was not invoked until the closure was an accomplished and irrevocable fact.[3] Upon

[3] Indeed, during subsequent oral argument, the trial court told counsel for petitioner: "It is very unfortunate that you were not here when the [closure] motion was made, but the motion was made and it was made with the moving force behind the motion being the rights of the defendants

petitioner's request, counsel for the newspaper was allowed within a reasonable time after the request to present written and oral arguments to the court challenging its closure order.

At this oral argument, the trial court applied a standard similar to that set forth above. It first reviewed for petitioner's counsel the factual basis for its finding that closure had been necessary to preserve the fairness of the defendants' trial. In the court's view, the nature of the evidence to be considered at the hearing, the young age of two of the defendants, and the extent of the publicity already given the case had indicated that an open hearing would substantially jeopardize the fairness of the defendants' subsequent trial. Moreover, the court emphasized the fact that the prosecutor, as well as each of the defense lawyers, had endorsed the closure motion. On the other hand, the court found that petitioner had not presented any basis for changing the court's views on the need for closure. Throughout oral argument, the court recognized the constitutional right of the press and public to be present at criminal proceedings. It concluded, however, that in the "unique situation" presented to it, closure had been appropriate, and that the seal it had placed upon the transcript of the suppression hearing should continue in effect.[4]

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to a fair trial." App. 13. "The Gannett newspapers knew that the matter was scheduled for a hearing, they did have an opportunity to have counsel present on that particular morning that the [closure] motion was made, and unfortunately there was no representative of the Gannett newspapers." *Id.*, at 17.

[4] It does not appear from the record that the trial court gave any explicit consideration to the alternatives to closure and the sealing of the transcript. Although generally such consideration is necessary in order to determine whether the Constitution permits closure, see *supra*, at 400, in the circumstances of the present case I cannot find error in the trial court's method of proceeding. Petitioner's counsel, when he appeared after the closure order had been effectuated, suggested only obliquely that the court should consider alternatives such as a change of venue. At oral argument before the court, the lawyer insisted that "there must be a

In my view, the procedure followed by the trial court fully comported with that required by the Constitution. Moreover, the substantive standard applied was essentially correct, and, giving due deference to the proximity of the trial judge to the surrounding circumstances, I cannot conclude that it was error in this case to exclude petitioner's reporter. I therefore agree that the judgment of the New York Court of Appeals must be affirmed.

MR. JUSTICE REHNQUIST, concurring.

While I concur in the opinion of the Court, I write separately to emphasize what should be apparent from the Court's Sixth Amendment holding and to address the First Amendment issue that the Court appears to reserve.

The Court today holds, without qualification, that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Ante,* at 391. In this case, the trial judge closed the suppression hearing because he concluded that an open hearing might have posed a danger to the defendants' ability to receive a fair trial. *Ante,* at 376. But the Court's recitation of this fact and its discussion of the need to preserve the defendant's right to a fair trial, *ante,* at 378–379, should not be interpreted to mean that under the Sixth Amendment a trial court can close

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factual showing that there are no alternative means of remedying that problem [of prejudicial publicity], and the only thing that has been mentioned today . . . is that there is a reasonable probability that the defendants' case would be prejudiced." Insofar as this remark suggested that the burden was on the defendants to prove that there were no alternatives to closure, the court properly rejected the suggestion. See discussion, *supra,* at 401. And it appears that petitioner's counsel, for his part, made no effort to show that any alternative method of proceeding would be satisfactory. In light of the unsettled state of the law confronting the trial court, and the uncertain nature of the claims petitioner was making, I conclude that there was no material deviation from the guidelines set forth above.

a pretrial hearing or trial only when there is a danger that prejudicial publicity will harm the defendant.[1] To the contrary, since the Court holds that the public does not have *any* Sixth Amendment right of access to such proceedings, it necessarily follows that if the parties agree on a closed proceeding, the trial court is not required by the Sixth Amendment to advance any reason whatsoever for declining to open a pretrial hearing or trial to the public. "There is no question that the Sixth Amendment permits and even presumes open trials as a norm." *Ante*, at 385. But, as the Court today holds, the Sixth Amendment does not require a criminal trial or hearing to be opened to the public if the participants to the litigation agree for any reason, no matter how jurisprudentially appealing or unappealing, that it should be closed.

The Court states that it may assume *"arguendo"* that the First and Fourteenth Amendments guarantee the public a right of access to pretrial hearings in some situations, because it concludes that in this case this "putative right was given all appropriate deference." *Ante*, at 392. Despite the Court's seeming reservation of the question whether the First Amendment guarantees the public a right of access to pretrial proceedings, it is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings. See *post*, at 411; *Nixon* v. *Warner Communications, Inc.*, 435 U. S. 589, 609 (1978); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974); *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665, 684–685 (1972); *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965); *Estes* v. *Texas*, 381 U. S. 532,

[1] In fact, as both the Court and the dissent recognize, the instances in which pretrial publicity alone, even pervasive and adverse publicity, actually deprives a defendant of the ability to obtain a fair trial will be quite rare. *Ante*, at 379 n. 6; *post*, at 443–444; see *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 551–555 (1976); *Murphy* v. *Florida*, 421 U. S. 794, 798–799 (1975); *Beck* v. *Washington*, 369 U. S. 541, 557 (1962); *Stroble* v. *California*, 343 U. S. 181, 191–194 (1952).

539–540 (1965). See also *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 9–15 (1978) (opinion of BURGER, C. J., joined by WHITE and REHNQUIST, JJ.); *id.*, at 16 (STEWART, J., concurring). "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors." *Ibid.* Thus, this Court emphatically has rejected the proposition advanced in MR. JUSTICE POWELL's concurring opinion, *ante*, at 400–401, that the First Amendment is some sort of constitutional "sunshine law" that requires notice, an opportunity to be heard, and substantial reasons before a governmental proceeding may be closed to the public and press. Because this Court has refused to find a First Amendment right of access in the past, lower courts should not assume that after today's decision they must adhere to the procedures employed by the trial court in this case or to those advanced by MR. JUSTICE POWELL in his separate opinion in order to avoid running afoul of the First Amendment. To the contrary, in my view and, I think, in the view of a majority of this Court, the lower courts are under no constitutional constraint either to accept or reject those procedures. They remain, in the best tradition of our federal system, free to determine for themselves the question whether to open or close the proceeding.[2] Hope-

[2] My Brother POWELL suggests in his concurring opinion that I am wrong in so stating. *Ante*, at 398 n. 2. He believes that the four dissenters—who expressly reject his First Amendment views, *post*, at 411, and who, instead, rely on a Sixth Amendment analysis that is repudiated by a majority of the Court today—will join him in any subsequent case to impose constitutional limitations on the ability of a trial court to close judicial proceedings. I disagree with MR. JUSTICE POWELL for two reasons. First, in a matter so commonly arising in the regular administration of criminal justice, I do not so lightly as my Brother POWELL impute to the four dissenters in this case a willingness to ignore the doctrine of *stare*

fully, they will decide the question by accommodating competing interests in a judicious manner. But so far as the Constitution is concerned, the question is for them, not us, to resolve.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I concur in Part II of the Court's opinion but I dissent from that opinion's subsequent Parts. I also cannot join the Court's phrasing of the "question presented," *ante*, at 370–371, or its distress and concern with the publicity the Clapp murder received in the Seneca County, N. Y., area.

Today's decision, as I view it, is an unfortunate one. I fear that the Court surrenders to the temptation to overstate and overcolor the actual nature of the pre-August 7, 1976, publicity; that it reaches for a strict and flat result; and that in the process it ignores the important antecedents and significant developmental features of the Sixth Amendment. The result is an inflexible *per se* rule, as MR. JUSTICE REHNQUIST so appropriately observes in his separate concurrence, *ante*, at 403–404. That rule is to the effect that if the defense and the prosecution merely agree to have the public excluded from a suppression hearing, and the trial judge does not resist—as trial judges may be prone not to do, since nonresistance is easier than resistance—closure shall take place, and there is nothing in the Sixth Amendment that prevents

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decisis and to join with him in some later decision to form what might fairly be called an "odd quintuplet," agreeing that the authority of trial courts to close judicial proceedings to the public is subject to limitations stemming from two different sources in the Constitution. But even if this were to occur, the very diversity of views that necessarily would be reflected in any such disposition would seem to me, as a practical matter, to place outside of any limits imposed by the United States Constitution all but the most bizarre orders closing judicial proceedings—the sort of orders which have spawned the saying that "hard cases make bad law."

that happily agreed upon event. The result is that the important interests of the public and the press (as a part of that public) in open judicial proceedings are rejected and cast aside as of little value or significance.

Because I think this easy but wooden approach is without support either in legal history or in the intendment of the Sixth Amendment, I dissent.

I

The Court's review of the facts, *ante*, at 371–377, does not face up to the placid, routine, and innocuous nature of the news articles about the case and, indeed, their comparative infrequency. I attempt to supply what is missing:

The reporting by both newspapers on August 3 of the filing of the indictments was the first time either of the two papers had carried any comment about the case since July 25, nine days before. On August 6, each paper carried a story reporting the arraignments of Greathouse and Jones on the preceding day. Thereafter, no story about the Clapp case appeared in petitioner's papers until the suppression hearing on November 4. Thus, for 90 days preceding that hearing there was *no* publicity whatsoever. From July 20, when the first story appeared, until August 6, a period of 18 days, 14 different articles were printed in the two papers. Because the evening paper usually reprinted or substantially duplicated the morning story, there were articles on only 7 different days during this 18-day period, with the evening story containing little that differed from the morning story on the 5 days that accounts appeared in both papers.

Furthermore, there can be no dispute whatsoever that the stories consisted almost entirely of straightforward reporting of the facts surrounding the investigation of Clapp's disappearance, and of the arrests and charges. The stories contained no "editorializing" and nothing that a fairminded person could describe as sensational journalism. Only one picture appeared; it was a photograph of Clapp that accom-

panied the first story printed by the Times-Union. There is nothing in the record to indicate that the stories were placed on the page or within the paper so as to play up the murder investigation. Headlines were entirely factual. The stories were relatively brief. They appeared only in connection with a development in the investigation, and they gave no indication of being published to sustain popular interest in the case.

The motions to suppress came on before Judge DePasquale on November 4. Despite the absence of any publicity in the newspapers for three months, counsel for both defendants, at the commencement of the hearing and without previously having indicated their intention so to do, asked for the exclusion of all members of the public and press present in the courtroom. They urged as grounds for their motions that "we are going to take evidentiary matters into consideration here that may or may not be brought forth subsequently at a trial." App. 4. After being reminded by the court that the defendants had a constitutional right to a public trial and that such exclusion "does abridge the rights, the constitutional rights, of the defendants," Greathouse's attorney, joined by Jones' lawyer, stated: "I fully understand that, your Honor, but this is not a trial, it is a hearing, and I think the dilatorious [*sic*] effects far outweigh the constitutional rights." *Id.*, at 5. The court then turned to the District Attorney. The prosecutor indicated that he did not wish to be heard with respect to the motion and said only: "I stated earlier that I thought it was up to the defense, and I would not oppose what they wished to do." *Ibid.* Thereupon the court, without further inquiry, granted the motion for closure. It said that "it is not the trial of the matter" and that "matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendant." *Id.*, at 6.

We therefore have a situation where the two defense attorneys suddenly and without notice moved that the suppression hearing be closed, and where the prosecutor, obviously taken off guard and having no particularly strong feeling, or any

considered position, acquiesced. The court, to its credit, was sensitive about the rights of the defendants to a public proceeding, even though it thought "it is not the trial of the matter." The court obviously was not impressed with any brooding presence of possible prejudicial publicity. Its comment was only that "evidentiary matters may come up . . . that may be prejudicial." It is difficult to imagine anything less sensational in a murder context.

Yet this is all that the Court possesses to justify its description of the question presented as one in the context of an agreement by the accused, the prosecutor, and the trial judge to have closure "in order to assure a fair trial," *ante*, at 371, and the hearing as one where, *ante*, at 375, "defense attorneys argued that the unabated buildup of adverse publicity had jeopardized the ability of the defendants to receive a fair trial."

I find little in the record that tends to support either of those descriptions of such serious consequence. There is no reference to or inference of an "unabated buildup of adverse publicity." All the defense attorneys spoke of were "the dilatorious effects" of "evidentiary matters . . . that may or may not be brought forth subsequently at a trial." App. 5, 4. MR. JUSTICE REHNQUIST notes this thin concern. *Ante*, at 403–404. The defense lawyers were representing their clients, of course, and perhaps were properly overcautious, but they certainly favored the court with nothing about "unabated buildup of adverse publicity" that must be prevented "in order to assure a fair trial." In fairness to the Court today, its colorful allusions to what it assumes took place when the motions were presented on November 4 may be attributable to comments in the opinion of the majority of the New York Court of Appeals: [1]

"At the commencement of a pretrial suppression hear-

[1] Two of the six judges who heard the case in the New York Court of Appeals dissented. They would have found the order entered by the

ing, defense attorneys argued that an unabated buildup of adverse publicity had already jeopardized their clients' ability to receive a fair trial." 43 N. Y. 2d 370, 375, 372 N. E. 2d 544, 546.

"The details, however, were not known and public curiosity was intense." *Id.*, at 381, 372 N. E. 2d, at 550.

The New York majority went on to rule that the presumption of closure was raised in this case because the public knew that respondents Greathouse and Jones "had been caught 'red-handed' by Michigan police with fruits of the crime," and because it was "widely known" that they "had made incriminating statements before being returned to" New York. *Ibid.*, 372 N. E. 2d, at 550. And the court found that the level of "legitimate public concern" necessary to overcome the presumption of closure had not been demonstrated:

"Widespread public awareness kindled by media saturation does not legitimize mere curiosity. Here the public's concern was not focused on prosecutorial or judicial accountability; irregularities, if any, had occurred out of State. The interest of the public was chiefly one of active curiosity with respect to a notorious local happening." *Ibid.*, 372 N. E. 2d, at 550.

With all respect, it is difficult for me to extract all of that from the casual comments made at the hearing before Judge DePasquale. Cf. *People* v. *Jones*, 47 N. Y. 2d 409, 391 N. E. 2d 1335 (1979).

II

This Court confronts in this case another aspect of the recurring conflict that arises whenever a defendant in a criminal case asserts that his right to a fair trial clashes with the right of the public in general, and of the press in particular, to an

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County Court to be of the type of prior restraint prohibited by *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), and would have affirmed the Appellate Division on the ground that the evidence did not support entry of the order. 43 N. Y. 2d 370, 382, 372 N. E. 2d 544, 551.

open proceeding. It has considered other aspects of the problem in deciding whether publicity was sufficiently prejudicial to have deprived the defendant of a fair trial. Compare *Murphy* v. *Florida*, 421 U. S. 794 (1975), with *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966). And recently it examined the extent to which the First and Fourteenth Amendments protect news organizations' rights to publish, free from prior restraint, information learned in open court during a pretrial suppression hearing. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976). But the Court has not yet addressed the precise issue raised by this case: whether and to what extent the Constitution prohibits the States from excluding, at the request of a defendant, members of the public from such a hearing. See *id.*, at 564 n. 8; *id.*, at 584 n. 11 (BRENNAN, J., concurring in judgment); *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1308 n. 3 (1974) (POWELL, J., in chambers).

It is clear that this case does not involve the type of prior restraint that was in issue in cases like *Nebraska Press*. Neither the County Court nor the Court of Appeals restrained publication of, or comment upon, information already known to the public or the press, or about the case in general. The issue here, then, is not one of prior restraint on the press but is, rather, one of *access* to a judicial proceeding.

Despite MR. JUSTICE POWELL's concern, *ante*, p. 397, this Court heretofore has not found, and does not today find, any First Amendment right of access to judicial or other governmental proceedings. See, *e. g.*, *Nixon* v. *Warner Communications, Inc.*, 435 U. S. 589, 608–610 (1978); *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974). One turns then, instead, to that provision of the Constitution that speaks most directly to the question of access to judicial proceedings, namely, the public-trial provision of the Sixth Amendment.

A

The familiar language of the Sixth Amendment reads: "In all criminal prosecutions, the accused shall enjoy the right

to a speedy and public trial." This provision reflects the tradition of our system of criminal justice that a trial is a "public event" and that "[w]hat transpires in the court room is public property." *Craig* v. *Harney*, 331 U. S. 367, 374 (1947). And it reflects, as well, "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine* v. *United States*, 362 U. S. 610, 616 (1960), quoting *Offutt* v. *United States*, 348 U. S. 11, 14 (1954).

More importantly, the requirement that a trial of a criminal case be public embodies our belief that secret judicial proceedings would be a menace to liberty. The public trial is rooted in the "principle that justice cannot survive behind walls of silence," *Sheppard* v. *Maxwell*, 384 U. S., at 349, and in the "traditional Anglo-American distrust for secret trials," *In re Oliver*, 333 U. S. 257, 268 (1948). This Nation's accepted practice of providing open trials in both federal and state courts "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.*, at 270.

The public-trial guarantee, moreover, ensures that not only judges but all participants in the criminal justice system are subjected to public scrutiny as they conduct the public's business of prosecuting crime. This publicity "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard* v. *Maxwell*, 384 U. S., at 350. Publicity "serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 492 (1975). "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate

concern to the public." *Ibid.* Indeed, such information is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Id.*, at 495.[2] Even in those few cases in which the Court has permitted limits on courtroom publicity out of concern for prejudicial coverage, it has taken care to emphasize that publicity of judicial proceedings "has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field." *Sheppard* v. *Maxwell*, 384 U. S., at 350. And in *Estes* v. *Texas*, 381 U. S. 532, 541 (1965), the Court found that it "is true that the public has the right to be informed as to what occurs in its courts." MR. JUSTICE STEWART, the author of the Court's opinion here, stated in dissent in *Estes*, *id.*, at 614–615: "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern."

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[2] Although I am dealing here with access under the Sixth Amendment, it is worthy of note that this Court's decisions emphasizing the protection afforded reporting of judicial proceedings under the First Amendment also point up the grave concern that information relating to the administration of criminal justice be widely available. In *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978), for example, the Court noted that "the operation of the judicial system itself . . . is a matter of public interest," *id.*, at 839, and that reporting judicial disciplinary proceedings "lies near the core of the First Amendment." *Id.*, at 838. And in *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 559, the Court recognized that "[t]ruthful reports of public judicial proceedings have been afforded special protection against subsequent punishment" because of the importance of free commentary about the conduct of the criminal justice system. Any question of access under the Sixth Amendment aside, the "extraordinary protections afforded by the First Amendment" with respect to the reporting of judicial proceedings, *id.*, at 560, indicate the importance attached to making the public aware of the business of the courts. "The administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the active cooperation of an enlightened public." *Wood* v. *Georgia*, 370 U. S. 375, 391 (1962). See *Bridges* v. *California*, 314 U. S. 252 (1941); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946).

The importance we as a Nation attach to the public trial is reflected both in its deep roots in the English common law and in its seemingly universal recognition in this country since the earliest times. When *In re Oliver* was decided in 1948, the Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country," 333 U. S., at 266 (footnote omitted), with the exception of cases in courts-martial and the semiprivate conduct of juvenile court proceedings. *Id.*, at 266 n. 12. Nor could it uncover any record "of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641." *Ibid.* This strong tradition of publicity in criminal proceedings, and the States' recognition of the importance of a public trial, led the Court in *In re Oliver* to conclude that the Sixth Amendment's guarantee of a public trial, as applied to the States through the Fourteenth Amendment, proscribed conviction through the type of secret process at issue in that case.

The public-trial concept embodied in the Sixth Amendment remains a fundamental and essential feature of our system of criminal justice in both the federal courts and in the state courts.[3] The Due Process Clause of the Fourteenth Amend-

[3] Forty-eight of the fifty States protect the right to a public trial in one way or another. Forty-five have constitutional provisions specifically guaranteeing the right: Ala. Const., Art. 1, § 6; Alaska Const., Art. I, § 11; Ariz. Const., Art. 2, §§ 11, 24; Ark. Const., Art. 2, § 10; Cal. Const., Art. 1, § 15; Colo. Const., Art. 2, § 16; Conn. Const., Art. 1, § 8; Del. Const., Art. 1, §§ 7, 9; Fla. Const., Art. 1, § 16; Ga. Const., Art. 1, § 1, ¶ 11; Haw. Const., Art. 1, § 11; Idaho Const., Art. 1, § 13; Ill. Const., Art. 1, § 8; Ind. Const., Art. 1, §§ 12, 13; Iowa Const., Art. 1, § 10; Kan. Const., Bill of Rights, § 10; Ky. Const., Bill of Rights, §§ 11, 14; La. Const., Art. 1, §§ 16, 22; Me. Const., Art. 1, § 6; Mich. Const., Art. 1, § 20; Minn. Const., Art. 1, § 6; Miss. Const., Art. 3, §§ 24, 26; Mo. Const., Art. 1, § 18 (a); Mont. Const., Art. 2, § 24; Neb. Const., Art. 1, § 11; N. J. Const., Art. 1, ¶ 10; N. M. Const., Art. 2, § 14; N. C. Const., Art. 1, §§ 18, 24; N. D. Const., Art. 1, §§ 13, 22; Ohio Const., Art. 1, §§ 10, 16; Okla. Const., Art. 2, § 20; Ore. Const., Art. 1, § 11; Pa. Const., Art. 1,

ment requires that in criminal cases the States act in conformity with the public-trial provision of the Sixth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145, 148 (1968); *Argersinger* v. *Hamlin*, 407 U. S. 25, 28 (1972).

B

By its literal terms, the Sixth Amendment secures the right to a public trial only to "the accused." And in this case, the accused were the ones who sought to waive that right, and to have the public removed from the pretrial hearing in order to guard against publicity that possibly would be prejudicial to them. The Court is urged, accordingly, to hold that the decision of respondents Greathouse and Jones to submit to a private hearing is controlling.

The Court, however, previously has recognized that the Sixth Amendment may implicate interests beyond those of the accused. In *Barker* v. *Wingo*, 407 U. S. 514 (1972), for example, the Court unanimously found this to be so with respect to the right to a speedy trial. "In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at

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§§ 9, 11; R. I. Const., Art. 1, § 10; S. C. Const., Art. 1, §§ 9, 14; S. D. Const., Art. 6, §§ 7, 20; Tenn. Const., Art. 1, §§ 9, 17; Tex. Const., Art. 1, § 10; Utah Const., Art. 1, §§ 11, 12; Vt. Const., Ch. 1, Art. 10th; Va. Const., Art. 1, § 8; Wash. Const., Art. 1, § 22; W. Va. Const., Art. 3, §§ 14, 17; Wis. Const., Art. 1, § 7; Wyo. Const., Art. 1, § 8.

In addition, New Hampshire has held that the Due Process Clause of its Constitution, Pt. 1, Art. 15, requires that criminal trials be held in public. *Martineau* v. *Helgemoe*, 117 N. H. 841, 842, 379 A. 2d 1040, 1041 (1977). Maryland by judicial decision requires open proceedings. *Dutton* v. *State*, 123 Md. 373, 386–387, 91 A. 417, 422–423 (1914). New York by statute provides for open trials. N. Y. Civil Rights Law, Art. 2, § 12 (McKinney 1976).

Only Masschusetts and Nevada appear to have no state provision for public trials. But see *Commonwealth* v. *Marshall*, 356 Mass. 432, 253 N. E. 2d 333 (1969).

times in opposition to, the interests of the accused." *Id.*, at 519. This separate public interest led the Court to reject a rule that would have made the defendant's assertion of his speedy-trial right the critical factor in deciding whether the right had been denied, for a rule depending entirely on the defendant's demand failed to take into account that "society has a particular interest in bringing swift prosecutions." *Id.*, at 527.

The same is true of other provisions of the Sixth Amendment. In *Singer* v. *United States*, 380 U. S. 24 (1965), the Court rejected a contention that, since the constitutional right to a jury trial was the right of the accused, he had an absolute right to be tried by a judge alone if he considered a bench trial to be to his advantage. Rejecting a mechanistic waiver approach, the Court reviewed the history of trial by jury at English common law and the practice under the Constitution. The common law did not indicate that the accused had a right to compel a bench trial. Although there were isolated instances where such a right had been recognized in the American Colonies, the Court could find no "general recognition of a defendant's right to be tried by the court instead of by a jury. Indeed, if there had been recognition of such a right, it would be difficult to understand why Article III and the Sixth Amendment were not drafted in terms which recognized an option." *Id.*, at 31. Noting that practice under the Constitution similarly established no independent right to a bench trial, the Court held that neither the jury trial provision in Art. III, § 2,[4] nor the Sixth Amendment empowered an accused to compel the opposite of what he was guaranteed specifically by the Constitution.

The Court in *Singer* recognized that in *Patton* v. *United States*, 281 U. S. 276 (1930), it had held that a defendant could waive his jury trial right, but it held that a proffered

[4] "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."

waiver need not be given effect in all cases. Quoting *Patton*, 281 U. S., at 312, the Court observed: "Trial by jury has been established by the Constitution as the 'normal and . . . preferable mode of disposing of issues of fact in criminal cases.'" 380 U. S., at 35. The Court rejected "the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process." *Id.*, at 36. Rather, the Court said, a defendant's "only constitutional right concerning the method of trial is to an impartial trial by jury." *Ibid.* Accordingly, the Court concluded that the Constitution was no impediment to conditioning the grant of a request for a bench trial upon the consent of the court and the Government.

In *Singer*, the Court also recognized that similar reasoning is applicable to other provisions to the Sixth Amendment. "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Id.*, at 34–35. For example, although the accused "can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district." *Id.*, at 35. While he "can waive his right to be confronted by the witnesses against him," he cannot thereby compel the prosecution "to try the case by stipulation." And, most relevant here, "although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial." *Ibid.*

Indeed, in only one case, apparently, *Faretta* v. *California*, 422 U. S. 806 (1975), has this Court ever inferred from the Sixth Amendment a right that fairly may be termed the "opposite" of an explicit guarantee. In *Faretta*, the Court found that not only did the Amendment secure the assistance of counsel to the defendant in a criminal prosecution, but, by inference, it also granted him the right to self-representation.

In so ruling, however, the Court was careful to stress that it followed *Singer*'s holding that the ability to waive a Sixth Amendment right did not carry with it the automatic right to insist upon its opposite. "The inference of rights is not, of course, a mechanical exercise." 422 U. S., at 819 n. 15. By inferring the existence of a right to self-representation, the Court did not mean to "suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel. . . . On the contrary, the right must be independently found in the structure and history of the constitutional text." *Id.*, at 819–820, n. 15. Following the approach of *Singer*, then, the Court found that "the structure of the Sixth Amendment, as well as . . . the English and colonial jurisprudence from which the Amendment emerged," 422 U. S., at 818, established the existence of an independent right of self-representation.

C

It is thus clear from *Singer*, *Barker*, and *Faretta* that the fact the Sixth Amendment casts the right to a public trial in terms of the right of the accused is not sufficient to permit the inference that the accused may compel a private proceeding simply by waiving that right. Any such right to compel a private proceeding must have some independent basis in the Sixth Amendment. In order to determine whether an independent basis exists, we should examine, as the Court did in *Singer*, the common-law and colonial antecedents of the public-trial provision as well as the original understanding of the Sixth Amendment. If no such basis is found, we should then turn to the function of the public trial in our system so that we may decide under what circumstances, if any, a trial court may give effect to a defendant's attempt to waive his right.

1. The Court, in *In re Oliver*, 333 U. S., at 266, recognized that this Nation's "accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage." Study of that heritage reveals that the tradition

of conducting the proceedings in public came about as an inescapable concomitant of trial by jury, quite unrelated to the rights of the accused, and that the practice at common law was to conduct all criminal proceedings in public.

Early Anglo-Saxon criminal proceedings were "open-air meetings of the freemen who were bound to attend them." F. Pollock, The Expansion of the Common Law 140 (1904) (hereinafter Pollock). Criminal trials were by compurgation or by ordeal, and took place invariably before the assembled community, many of whom were required to attend. 1 W. Holdsworth, A History of English Law 7–24 (4th ed. 1927) (hereinafter Holdsworth). This Anglo-Saxon tradition of conducting a judicial proceeding "like an ill-managed public meeting," Pollock 30, persisted after the Conquest, when the Norman kings introduced in England the Frankish system of conducting inquests by means of a jury. Wherever royal justice was introduced, the jury system accompanied it, and both spread rapidly throughout England in the years after 1066. 1 Holdsworth 316. The rapid spread of royal courts led to the replacement of older methods of trial, which were always public, with trial by jury with little procedural change. The jury trial "was simply substituted for [older methods], and was adapted with as little change as possible to its new position." *Id.*, at 317. This substitution of royal justice for traditional law served the Crown's interests by "enlarging the king's jurisdiction and bringing well-earned profit in fines and otherwise to the king's exchequer, and the best way of promoting those ends was to develop the institution, or let it develop itself, along the lines of least resistance." Pollock 40.

Thus, the common law from its inception was wedded to the Anglo-Saxon tradition of publicity, and the "ancient rul[e that c]ourts of justice are public," *id.*, at 51, was in turn strengthened by the hegemony the royal courts soon established over the administration of justice. Bentham noted that by this accommodation of the common law to the Anglo-

Saxon practice of holding open courts, "publicity . . . became a natural, and, as good fortune would have it, at length an inseparable, concomitant" of English justice. 1 J. Bentham, The Rationale of Judicial Evidence 584–585 (1827).

Publicity thus became intrinsically associated with the sittings of the royal courts. Coke noted that the very words "In curia Domini Regis" ("In the King's Court"), in the Statutum de Marleberge, ch. 1, enacted in 1267, 52 Hen. 3, indicated public proceedings. 2 E. Coke, Institutes of the Laws of England 103 (6th ed. 1681).[5]

This and other commentary [6] indicate that by the 17th century the concept of a public trial was firmly established under the common law. Indeed, there is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history. Apparently, not even the Court of Star Chamber, the name of which has been linked with secrecy, conducted hearings in private. 5 Holdsworth 156, and nn. 5 and 7, and 163; Radin, The Right to a Public Trial, 6 Temp. L. Q. 381, 386–387 (1932). Rather, the unbroken tradition of the English common law was that criminal trials were conducted "openlie in the presence of the Judges,

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[5] "These words are of great importance, for all Causes ought to be heard, ordered, and determined before the Judges of the Kings Courts openly in the Kings Courts, whither all persons may resort; and in no chambers, or other private places: for the Judges are not Judges of chambers, but of Courts, and therefore in open Court, where the parties Councel and Attorneys attend, ought orders, rules, awards, and Judgments to be made and given, and not in chambers or other private places . . . . Nay, that Judge that ordereth or ruleth a Cause in his chamber, though his order or rule be just, yet offendeth he the Law, (as here it appeareth) because he doth it not in Court."

[6] See, *e. g.*, T. Smith, De Republica Anglorum 79, 101 (Alston ed. 1972), published in 1583, where the author, in contrasting the English common law with the civil law system of the Continent, stressed that in England all adjudications were open to the public as a matter of course. See also *Trial of John Lilburne* (1649), reported in 4 How. St. Tr. 1270, 1274 (1816).

the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide." T. Smith, De Republica Anglorum 101 (Alston ed. 1972).

In the light of this history, it is most doubtful that the tradition of publicity ever was associated with the rights of the accused. The practice of conducting the trial in public was established as a feature of English justice long before the defendant was afforded even the most rudimentary rights. For example, during the century preceding the English Civil War, the defendant was kept in secret confinement and could not prepare a defense. He was not provided with counsel either before or at the trial. He was given no prior notice of the charge or evidence against him. He probably could not call witnesses on his behalf. Even if he could, he had no means to procure their attendance. Witnesses were not necessarily confronted with the prisoner. Document originals were not required to be produced. There were no rules of evidence. The confessions of accomplices were admitted against each other and regarded as specially cogent evidence. And the defendant was compelled to submit to examination. 1 J. Stephen, A History of the Criminal Law of England 350 (1883). Yet the trial itself, without exception, was public.

It is not surprising, therefore, that both Hale and Blackstone, in identifying the function of publicity at common law, discussed the open-trial requirement not in terms of individual liberties but in terms of the effectiveness of the trial process. Each recognized publicity as an essential of trial at common law. And each emphasized that the requirement that evidence be given in open court deterred perjury, since "a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal." 3 W. Blackstone, Commentaries *373. See M. Hale, The History of the Common Law of England 343, 345 (6th ed. 1820).

Similarly, both recognized that publicity was an effective check on judicial abuse, since publicity made it certain that "if the judge be PARTIAL, his partiality and injustice will be evident to all by-standers." *Id.*, at 344. See 3 W. Blackstone, Commentaries *372.[7]

In the same vein, Bentham stressed that publicity was "the most effectual safeguard of testimony, and of the decisions depending on it; it is the soul of justice; it ought to be extended to every part of the procedure, and to all causes." J. Bentham, A Treatise On Judicial Evidence 67 (1825). Bentham believed that, above all, publicity was the most effectual safeguard against judicial abuse, without which all other checks on misuse of judicial power became ineffectual. 1 J. Bentham, The Rationale of Judicial Evidence 525 (1827). And he contended that publicity was of such importance to the administration of justice, especially in criminal cases, that it should not be dispensed with even at the request of the defendant. "The reason is . . . there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the other persons concerned (the judge included) be made a sacrifice." *Id.*, at 576–577.

This English common-law tradition concerning public trials out of which the Sixth Amendment provision grew is not made up of "shreds of English legal history and early state constitutional and statutory provisions," see *Faretta* v. *California*, 422 U. S., at 843 (dissenting opinion describing the right of self-representation), pieced together to produce the desired result.

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[7] Similarly, the Solicitor General, Sir John Hawles, in 1685 in his Remarks upon Mr. Cornish's Trial, 11 How. St. Tr. 455, 460, stated:

"The reason that all matters of law are, or ought to be transacted publicly, is, That any person, unconcerned as well as concerned, may, as *amicus curiae*, inform the court better, if he thinks they are in an error, that justice may be done: and the reason that all trials are public, is, that any person may inform in point of fact, though not *subpoena'd*, that truth may be discovered in civil as well as criminal matters."

Whatever may be said of the historical analysis of other Sixth Amendment provisions, history here reveals an unbroken tradition at English common law of open judicial proceedings in criminal cases. In publicity, we "have one tradition, at any rate, which has persisted through all changes" from Anglo-Saxon times through the development of the modern common law. Pollock 31–32. See E. Jenks, The Book of English Law 73–74 (6th ed. 1967). There is no evidence that criminal trials of any sort ever were conducted in private at common law, whether at the request of the defendant or over his objection. And there is strong evidence that the public trial, which developed before other procedural rights now routinely afforded the accused, widely was perceived as serving important social interests, relating to the integrity of the trial process, that exist apart from, and conceivably in opposition to, the interests of the individual defendant. Accordingly, I find no support in the common-law antecedents of the Sixth Amendment public-trial provision for the view that the guarantee of a public trial carries with it a correlative right to compel a private proceeding.[8]

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[8] The continuing development in England of the common-law notion of publicity during the years since the founding of our own Nation casts light upon the function of publicity in our system of justice. For example, in a series of cases establishing a privilege for the reporting of judicial proceedings, the courts recognized: "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings." *King* v. *Wright*, 8 D. & E. 293, 298, 101 Eng. Rep. 1396, 1399 (K. B. 1799). See *Davison* v. *Duncan*, 7 El. & Bl. 229, 230–231, 119 Eng. Rep. 1233, 1234 (Q. B. 1857); *Wason* v. *Walter*, 4 L. R. 73, 88 (Q. B. 1868).

Important for my purposes is the decision in *Daubney* v. *Cooper*, 10 B. & C. 237, 109 Eng. Rep. 438 (K. B. 1829). There the court upheld a verdict for damages in an action by a spectator, who had been ejected

2. This English common-law view of the public trial early was transplanted to the American Colonies, largely through the influence of the common-law writers whose views shaped the early American legal systems. "Coke's Institutes were read in the American Colonies by virtually every student of the law," *Klopfer* v. *North Carolina*, 386 U. S. 213, 225 (1967), and no citation is needed to establish the impact of Hale and Blackstone on colonial legal thought. Early colonial charters reflected the view that open proceedings were an essential quality of a court of justice, and they cast the concept of a public trial in terms of a characteristic of the system of justice, rather than of a right of the accused. Indeed, the first public-trial provision to appear in America spoke in terms of the right of the public, not the accused, to attend trials:

> "That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner." Concessions and Agreements of West New Jersey (1677), ch. XXIII, quoted in 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971) (hereinafter Schwartz).

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from a criminal proceeding, against the magistrate who had ejected him. The court stated:

"[I]t is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose,—provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed,—have a right to be present for the purpose of hearing what is going on." *Id.*, at 240, 109 Eng. Rep., at 440.

See also *Scott* v. *Scott*, [1913] A. C. 417, 438–439 (Haldane, L. C.), 440–441 (Earl of Halsbury).

Similarly, the Pennsylvania Frame of Government of 1682, which Professor Schwartz described as, "[i]n many ways, [one of] the most influential of the Colonial documents protecting individual rights," 1 Schwartz 130, provided that in Willian Penn's colony "all courts shall be open." *Id.*, at 140.

This practice of conducting judicial proceedings in criminal cases in public took firm hold in all the American Colonies. There is no evidence that any colonial court conducted criminal trials behind closed doors or that any recognized the right of an accused to compel a private trial.

Neither is there any evidence that casting the public-trial concept in terms of a right of the accused signaled a departure from the common-law practice by granting the accused the power to compel a private proceeding. The first provision to speak of the public trial as an entitlement of the accused apparently was that in ¶ IX of the Pennsylvania Declaration of Rights of 1776. It said that "in all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial." See 1 Schwartz 265. The provision was borrowed almost verbatim from the Virginia Declaration of Rights, adopted earlier the same year, with one change: the word "public" was added. Virginia's Declaration had provided only that the accused "hath a right to . . . a speedy trial." See *id.*, at 235. It is doubtful that, by adding this single word, Pennsylvania intended to depart from its historic practice by creating a right waivable by the defendant, for at the time its Declaration of Rights was adopted, Pennsylvania also adopted its Constitution of 1776, providing, in § 26, that "[a]ll courts shall be open." See 1 Schwartz 271. And there is no evidence that after 1776 Pennsylvania departed from earlier practice, either by conducting trials in private or by recognizing a power in the accused to compel a nonpublic proceeding.[9]

[9] Although a number of States followed the language of Virginia's Declaration, only Vermont copied the Pennsylvania emendation by adding the word "public" to the speedy-trial provision. Vt. Const., Declaration

Similarly, there is no indication that the First Congress, in proposing what became the Sixth Amendment, meant to depart from the common-law practice by creating a power in an accused to compel a private proceeding. The Constitution as originally adopted, of course, did not contain a public-trial guarantee. And though several States proposed amendments to Congress along the lines of the Virginia Declaration, only New York mentioned a "public" trial. See E. Dumbauld, The Bill of Rights 173–205 and, specifically, 190 (1957); 1 Elliot's Debates 328 (2d ed. 1836). But New York did not follow Virginia's language by casting the right as one belonging only to the accused; it urged rather that Congress should propose an amendment providing that the "trial should be speedy, public, and by an impartial jury . . . ." Amendments Proposed by New York (1788), quoted in 1 Elliot's Debates, at 328.

I am thus persuaded that Congress, modeling the proposed amendment on the cognate provision in the Virginia Declaration, as many States had urged, did merely what Pennsylvania had done in 1776, namely, added the word "public" to the Virginia language without at all intending thereby to create a correlative right to compel a private proceeding. Indeed, in light of the settled practice at common law, one may also say here that "if there had been recognition of such a right, it would be difficult to understand why . . . the Sixth Amendment [was] not drafted in terms which recognized an option." *Singer* v. *United States*, 380 U. S., at 31. And, to use the language of the Court in *Faretta* v. *California*, 422

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of Rights § X (1777), quoted in 1 Schwartz 323. Once again, however, there is no evidence that by so doing Vermont intended to depart from the common-law practice of holding court in public. Indeed, the Vermont Declaration, adopted by the revolutionary legislature in haste, was "virtually [a] verbatim repetitio[n] of the relevant Pennsylvania" article. 1 Schwartz 319. It is thus doubtful that by adding the word "public" Vermont, any more than Pennsylvania, intended to alter existing practice.

U. S., at 832: "If anyone had thought that the Sixth Amendment, as drafted," departed from the common-law principle of publicity in criminal proceedings, "there would undoubtedly have been some debate or comment on the issue. But there was none." Mr. Justice Story, writing when the adoption of the Sixth Amendment was within the memory of living man, noted that "in declaring, that the accused shall enjoy the right to a speedy and public trial . . . [the Sixth Amendment] does but follow out the established course of the common law in all trials for crimes. The trial is always public." 3 J. Story, Commentaries on the Constitution of the United States 662 (1833).

I consequently find no evidence in the development of the public-trial concept in the American Colonies and in the adoption of the Sixth Amendment to indicate that there was any recognition in this country, any more than in England, of a right to a private proceeding or a power to compel a private trial arising out of the ability to waive the grant of a public one. I shall not indulge in a mere mechanical inference that, by phrasing the public trial as one belonging to the accused, the Framers of the Amendment must have meant the accused to have the power to dispense with publicity.

3. I thus conclude that there is no basis in the Sixth Amendment for the suggested inference. I also find that, because there is a societal interest in the public trial that exists separately from, and at times in opposition to, the interests of the accused, cf. *Barker* v. *Wingo*, 407 U. S., at 519, a court may give effect to an accused's attempt to waive his public-trial right only in certain circumstances.

The courts and the scholars of the common law perceived the public-trial tradition as one serving to protect the integrity of the trial and to guard against partiality on the part of the court. The same concerns are generally served by the public trial today. The protection against perjury which publicity provides, and the opportunity publicity offers to unknown witnesses to make themselves known, do not necessarily serve

the defendant. See 6 J. Wigmore, Evidence § 1834 (Chadbourn rev. 1976) (hereinafter Wigmore). The public has an interest in having criminal prosecutions decided on truthful and complete records, and this interest, too, does not necessarily coincide with that of the accused.

Nor does the protection against judicial partiality serve only the defendant. It is true that the public-trial provision serves to protect every accused from the abuses to which secret tribunals would be prone. But the defendant himself may benefit from the partiality of a corrupt, biased, or incompetent judge, "for a secret trial can result in favor to as well as unjust prosecution of a defendant." *Lewis* v. *Peyton*, 352 F. 2d 791, 792 (CA4 1965).

Open trials also enable the public to scrutinize the performance of police and prosecutors in the conduct of public judicial business. Trials and particularly suppression hearings typically involve questions concerning the propriety of police and government conduct that took place hidden from the public view. Any interest on the part of the prosecution in hiding police or prosecutorial misconduct or ineptitude may coincide with the defendant's desire to keep the proceedings private, with the result that the public interest is sacrificed from both sides.

Public judicial proceedings have an important educative role as well. The victim of the crime, the family of the victim, others who have suffered similarly, or others accused of like crimes, have an interest in observing the course of a prosecution. Beyond this, however, is the interest of the general public in observing the operation of the criminal justice system. Judges, prosecutors, and police officials often are elected or are subject to some control by elected officials, and a main source of information about how these officials perform is the open trial. And the manner in which criminal justice is administered in this country is in and of itself of interest to all citizens. In *Cox Broadcasting Corp.* v. *Cohn*,

420 U. S., at 495, it was noted that information about the criminal justice system "appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business."

Important in this regard, of course, is the appearance of justice. "Secret hearings—though they be scrupulously fair in reality—are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *United States* v. *Cianfrani*, 573 F. 2d 835, 851 (CA3 1978). The ability of the courts to administer the criminal laws depends in no small part on the confidence of the public in judicial remedies, and on respect for and acquaintance with the processes and deliberations of those courts. 6 Wigmore § 1834, at 438. Anything that impairs the open nature of judicial proceedings threatens to undermine this confidence and to impede the ability of the courts to function.

These societal values secured by the public trial are fundamental to the system of justice on both the state and federal levels. As such, they have been recognized by the large majority of both state [10] and federal [11] courts that have con-

[10] Nearly every State that has considered the issue has recognized that the public has a strong interest in maintaining open trials. Most of these cases have involved state constitutional provisions modeled on the Sixth Amendment in that the public-trial right is phrased in terms of a guarantee to the accused. See, *e. g.*, *Jackson* v. *Mobley*, 157 Ala. 408, 411–412, 47 So. 590, 592 (1908); *Commercial Printing Co.* v. *Lee*, 262 Ark. 87, 93–96, 553 S. W. 2d 270, 273–274 (1977); *Lincoln* v. *Denver Post*, 31 Colo. App. 283, 285–286, 501 P. 2d 152, 154 (1972); *State ex rel. Gore Newspapers Co.* v. *Tyson*, 313 So. 2d 777, 785–788 (Fla. App. 1975); *Gannett Pacific Corp.* v. *Richardson*, 59 Haw. 224, 230–231, 580 P. 2d 49, 55 (1978); *State* v. *Beaudoin*, 386 A. 2d 731, 733 (Me. 1978); *Cox* v. *State*, 3 Md. App. 136, 139–140, 238 A. 2d 157, 158–159 (1968); *State* v. *Schmit*, 273 Minn. 78, 86–88, 139 N. W. 2d 800, 806–807 (1966); *State* v. *Keeler*, 52

[*Footnote 11 is on p. 430*]

sidered the issue over the years since the adoption of the Constitution. Indeed, in those States with constitutional pro-

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Mont. 205, 218–219, 156 P. 1080, 1083–1084 (1916); *Keene Publishing Corp.* v. *Keene District Court*, 117 N. H. 959, 962–963, 380 A. 2d 261, 263–264 (1977); *State* v. *Allen*, 73 N. J. 132, 157–160, 373 A. 2d 377, 389–390 (1977); *Neal* v. *State*, 86 Okla. Cr. 283, 289, 192 P. 2d 294, 297 (1948); *State* v. *Holm*, 67 Wyo. 360, 382–385, 224 P. 2d 500, 508–509 (1950).

Several States have recognized such an interest under constitutional provisions establishing open courts. *E. g., State* v. *White*, 97 Ariz. 196, 198, 398 P. 2d 903, 904 (1965); *Smith* v. *State*, 317 A. 2d 20, 23–24 (Del. 1974); *Johnson* v. *Simpson*, 433 S. W. 2d 644, 646 (Ky. 1968); *Brown* v. *State*, 222 Miss. 863, 869, 77 So. 2d 694, 696 (1955); *In re Edens*, 290 N. C. 299, 306, 226 S. E. 2d 5, 9–10 (1976); *E. W. Scripps Co.* v. *Fulton*, 100 Ohio App. 157, 160–169, 125 N. E. 2d 896, 899–904 (1955); *State ex rel. Varney* v. *Ellis*, 149 W. Va. 522, 523–524, 142 S. E. 2d 63, 65 (1965).

Massachusetts appears to have no case precisely in point. But in *Cowley* v. *Pulsifer*, 137 Mass. 392 (1884), the Supreme Judicial Court, in an opinion by Mr. Justice Holmes, stated that the chief advantage of permitting a privilege for publication of reports of judicial proceedings "is the security which publicity gives for the proper administration of justice." *Id.*, at 394. The court continued:

"[This] privilege and the access of the public to the courts stand in reason upon common ground. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Ibid.*

[11] See, *e. g., United States* v. *Clark*, 475 F. 2d 240, 246–247 (CA2 1973); *Stamicarbon, N. V.* v. *American Cyanamid Co.*, 506 F. 2d 532, 540–542 (CA2 1974); *United States* v. *Cianfrani*, 573 F. 2d 835, 852–854 (CA3 1978); *Lewis* v. *Peyton*, 352 F. 2d 791, 792 (CA4 1965).

The Court today cites no case where the public has been totally excluded from all of a trial or all of a pretrial suppression hearing. See *ante*, at 388 n. 19. Indeed, in almost every case that the Court cites, no such general exclusion was permitted: In *Geise* v. *United States*, 262 F. 2d 151, 155 (CA9 1958), for example, the press, members of the bar, and relatives and friends of parties and the witnesses were allowed to remain. Similarly, in *United*

visions modeled on the Sixth Amendment, guaranteeing the right to a public trial literally only to the accused, there has

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States ex rel. Orlando v. *Fay*, 350 F. 2d 967, 970 (CA2 1965), the press and members of the bar were admitted at all times. In *State* v. *Croak*, 167 La. 92, 94–95, 118 So. 703, 704 (1928), a fair-sized audience composed of members of the public was always present. The court in *Beauchamp* v. *Cahill*, 297 Ky. 505, 508, 180 S. W. 2d 423, 424 (1944), though it recognized that the trial court could exclude limited classes of spectators in certain circumstances, held that that court could not exclude a "reasonable portion of the public" who wanted to attend, and it disapproved the limited exclusion that did occur. In *State* v. *Callahan*, 100 Minn. 63, 110 N. W. 342 (1907), and *Hogan* v. *State*, 191 Ark. 437, 86 S. W. 2d 931 (1935), the Court does point to cases where a court upheld an exclusion of all the public, though even there the exclusions were for strictly limited periods of time. Those exclusions were over the objections of the defendants, and they surely are questionable law today, not only under the Sixth Amendment but under state law as well. See *State* v. *Schmit*, 273 Minn., at 86–88, 139 N. W. 2d, at 805–807; *Commercial Printing Co.* v. *Lee*, 262 Ark., at 93–96, 553 S. W. 2d, at 273–274.

Similarly, though the Court cites a number of state statutory provisions that it says contain limitations on public trials, it cites no cases decided under those provisions excluding all the public and the press from trials or suppression hearings. If any such cases exist, which is doubtful, they are few indeed. It appears, rather, that such statutes have been interpreted to permit limited exclusion of certain groups of spectators from trial, but seldom applied so as to result in blanket exclusion of the public and press. For example, in *Reeves* v. *State*, 264 Ala. 476, 483, 88 So. 2d 561, 567 (1956), the court, in applying the Alabama provision cited by the Court, *ante*, at 388 n. 19, noted that the trial court had not excluded, among others, "members of the press, radio, television or other news-gathering services, . . . [and] members of the bar." Accord, *Ex parte Rudolph*, 276 Ala. 392, 393, 162 So. 2d 486, 487 (1964). Similarly, in applying the Georgia statute cited by the Court, the courts of that State have not excluded, among others, members of the press and of the bar. *E. g.*, *Moore* v. *State*, 151 Ga. 648, 651–652, 658–659, 108 S. E. 47, 49, 52 (1921). Indeed, in *Moore*, the trial court allowed the press to attend as one of the "parties at interest" not excludable. *Id.*, at 651, 108 S. E., at 49. And in upholding the constitutionality of the Massachusetts statute permitting exclusion in certain cases involving sex crimes, the Supreme Judicial Court noted that the press had not been excluded under the statute, and that it therefore need not reach the constitutionality of the

been widespread recognition that such provisions serve the interests of the public as well as those of the defendant.[12]

I therefore conclude that the Due Process Clause of the Fourteenth Amendment, insofar as it incorporates the public-

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statute in circumstances where the press was excluded, "even if the statute could be interpreted as permitting such exclusion" of the press. *Commonwealth* v. *Blondin*, 324 Mass. 564, 572, 87 N. E. 2d 455, 460 (1949). There is no evidence that under any of the other provisions cited by the Court tribunals have excluded all members of the public, including the press, from a trial or suppression proceeding.

The Court in *In re Oliver* recognized that, even though some cases up to that time had allowed limited departures from publicity, no court had gone so far as to sanction exclusion of the press. 333 U. S., at 272 n. 29. Since that time only the New York courts in this case, and perhaps some isolated others, have departed from this tradition in criminal cases. And although some commentators have criticized the Sixth Amendment approach to establishing a public right of access, they have gone on to find that right rooted in some other provision of the Constitution. *E. g.*, Note, The Right to Attend Criminal Hearings, 78 Colum. L. Rev. 1308, 1326–1331 (1978) (public access right derived from combination of the First and Sixth Amendments). Even Radin, whose ideas in this area Professor Wigmore described as "farfetched," 6 Wigmore § 1834, though he criticized public access, would not have excluded the press and selected members of the public from any trial. Radin, The Right to a Public Trial, 6 Temple L. Q. 381, 394–395 (1932).

[12] See cases cited in n. 10, *supra*. For example, in *Commercial Printing Co.* v. *Lee*, 262 Ark. 87, 553 S. W. 2d 270 (1977), the Supreme Court of Arkansas held that the exclusion of the public from the *voir dire* phase of a criminal trial violated the State's public-trial constitutional provision, even though it, like the Sixth Amendment, literally read in favor of only the accused. The court found that members of the public have a strong interest in observing criminal proceedings, inasmuch as they involve crimes against society. And it added that since courthouses, prosecutors, judges, and often defense attorneys are paid for with public funds, the public "has every right to ascertain by personal observation whether its officials are properly carrying out their duties in responsibly and capably administering justice, and it would require unusual circumstances for this right to be held subordinate to the contention of a defendant that he is prejudiced by a public trial (or any part thereof)." *Id.*, at 95, 553 S. W. 2d, at 274.

trial provision of the Sixth Amendment, prohibits the States from excluding the public from a proceeding within the ambit of the Sixth Amendment's guarantee without affording full and fair consideration to the public's interests in maintaining an open proceeding. And I believe that the Sixth and Fourteenth Amendments require this conclusion notwithstanding the fact it is the accused who seeks to close the trial.[13]

D

Before considering whether and under what circumstances a court may conduct a criminal proceeding in private, one must first decide whether the Sixth Amendment, as applied through the Fourteenth, encompasses the type of pretrial hearing contemplated by *Jackson* v. *Denno*, 378 U. S. 368 (1964), and at issue in this case. The Amendment, of course, speaks only of a public "trial." Both the County Court and the New York Court of Appeals emphasized that exclusion from the formal trial on the merits was not at issue, apparently in the belief that the Sixth Amendment's public-trial provision applies with less force, or not at all, to a pretrial proceeding.

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[13] The American Bar Association Standards adopt the view that the public has a strong interest in maintaining the openness of criminal trials, and that the Sixth Amendment protects that interest:

"The sixth amendment speaks in terms of the right of the accused to a public trial, but this right does not belong solely to the accused to assert or forgo as he or she desires. . . . The defendant's interest, primarily, is to ensure fair treatment in his or her particular case. While the public's more generalized interest in open trials includes a concern for justice to individual defendants, it goes beyond that. The transcendent reason for public trials is to ensure efficiency, competence, and integrity in the overall operation of the judicial system. Thus, the defendant's willingness to waive the right to a public trial in a criminal case cannot be the deciding factor. . . . It is just as important to the public to guard against undue favoritism or leniency as to guard against undue harshness or discrimination." ABA Project on Standards for Criminal Justice, Fair Trial and Free Press, Standard 8–3.2, p. 15 (App. Draft 1978). (Footnotes omitted.)

I find good reason to hold that even if a State, as it may, chooses to hold a *Jackson* v. *Denno* or other suppression hearing separate from and prior to the full trial, the Sixth Amendment's public-trial provision applies to that hearing. First, the suppression hearing resembles and relates to the full trial in almost every particular. Evidence is presented by means of live testimony, witnesses are sworn, and those witnesses are subject to cross-examination. Determination of the ultimate issue depends in most cases upon the trier of fact's evaluation of the evidence, and credibility is often crucial. Each side has incentive to prevail, with the result that the role of publicity as a testimonial safeguard, as a mechanism to encourage the parties, the witnesses, and the court to a strict conscientiousness in the performance of their duties, and in providing a means whereby unknown witnesses may become known, is just as important for the suppression hearing as it is for the full trial.

Moreover, the pretrial suppression hearing often is critical, and it may be decisive, in the prosecution of a criminal case. If the defendant prevails, he will have dealt the prosecution's case a serious, perhaps fatal, blow; the proceeding often then will be dismissed or negotiated on terms favorable to the defense. If the prosecution successfully resists the motion to suppress, the defendant may have little hope of success at trial (especially where a confession is in issue), with the result that the likelihood of a guilty plea is substantially increased. *United States* v. *Clark*, 475 F. 2d 240, 246–247 (CA2 1973); *United States* v. *Cianfrani*, 573 F. 2d, at 848–851.

The suppression hearing often is the only judicial proceeding of substantial importance that takes place during a criminal prosecution. In this very case, the hearing from which the public was excluded was the only one in which the important factual and legal issues in the prosecution of respondents Greathouse and Jones were considered. It was the only proceeding at which the conduct of the police, prosecution, and

the court itself was exposed to scrutiny. Indeed, in 1976, when this case was processed, every felony prosecution in Seneca County—and I say this without criticism—was terminated without a trial on the merits. N. Y. Leg. Doc. No. 90, Judicial Conference of the State of New York, 22d Annual Report 55 (1977). This statistic is characteristic of our state and federal criminal justice systems as a whole,[14] and it underscores the importance of the suppression hearing in the functioning of those systems.

Further, the issues considered at such hearings are of great moment beyond their importance to the outcome of a particular prosecution. A motion to suppress typically involves, as in this case, allegations of misconduct by police and prosecution that raise constitutional issues. Allegations of this kind, although they may prove to be unfounded, are of importance to the public as well as to the defendant. The searches and interrogations that such hearings evaluate do not take place in public. The hearing therefore usually presents the only opportunity the public has to learn about police and prosecutorial conduct, and about allegations that those responsible to the public for the enforcement of laws themselves are breaking it.

A decision to suppress often involves the exclusion of highly relevant evidence. Because this is so, the decision may generate controversy. See *Bivens* v. *Six Unknown Fed. Narcotics*

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[14] In 1976, in the Supreme Court for the city of New York, 89.7% of all criminal cases were terminated by dismissal (25.6%) or by plea of guilty (64.1%). N. Y. Leg. Doc. No. 90, Judicial Conference of the State of New York, 22d Annual Report 52 (1977). In the Supreme Courts and County Courts outside New York City, 93.4% of the criminal cases were disposed of by dismissal (18.9%) or by plea of guilty (74.5%). *Id.*, at 56.

As noted, these statistics are characteristic of the criminal justice system across the country. See generally National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Plea Bargaining in the United States, App. A (1978).

Agents, 403 U. S. 388, 412–420 (1971) (dissenting opinion). It is important that any such decision be made on the basis of evidence and argument offered in open court, so that all who care to see or read about the case may evaluate for themselves the propriety of the exclusion.

These factors lead me to conclude that a pretrial suppression hearing is the close equivalent of the trial on the merits for purposes of applying the public-trial provision of the Sixth Amendment. Unlike almost any other proceeding apart from the trial itself, the suppression hearing implicates all the policies that require that the trial be public. For this reason, I would be loath to hold that a State could conduct a pretrial *Jackson* v. *Denno* hearing in private over the *objection* of the defendant. And for this same reason, the public's interest in the openness of judicial proceedings is implicated fully when it is the accused who seeks to exclude the public from such a hearing. Accordingly, I conclude that the Sixth and Fourteenth Amendments prohibit a State from conducting a pretrial suppression hearing in private, even at the request of the accused, unless full and fair consideration is first given to the public's interest, protected by the Amendments, in open trials.[15]

The Court holds, however, that, even assuming the Sixth and Fourteenth Amendments could be viewed as embodying a public right of access to trials, there was no common-law right in members of the public to attend preliminary proceedings.

But I have not said that there was. I have demonstrated that there was a right to attend trials. And I have said that, because of the critical importance of suppression hearings to our systems of criminal justice—as well as because of the close similarity in form of a suppression hearing to a full

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[15] The ABA Standards take the position that pretrial suppression hearings are within the scope of the Sixth Amendment's public-trial provision. ABA Project on Standards for Criminal Justice, Fair Trial and Free Press, Standard 8–3.2, p. 15, and n. 1 (App. Draft 1978).

trial—for purposes of the Sixth Amendment public-trial provision the pretrial suppression hearing at issue in this case must be considered part of the trial.

It is significant that the sources upon which the Court relies do not concern suppression hearings. They concern hearings to determine probable cause to bind a defendant over for trial. *E. g.*, Indictable Offences Act, 11 & 12 Vict., ch. 42, §§ 17, 19 (1848); Cal. Penal Code Ann. § 868 (West Supp. 1979). Such proceedings are not critical to the criminal justice system in the way the suppression-of-evidence hearing is and they are not close equivalents of the trial itself in form. The fact that such proceedings might have been held in private at common law in England or in this country does not detract from my conclusion that pretrial suppression hearings should not be, any more than does the fact that grand juries—or preliminary proceedings such as coroner's inquests at common law—were and are secret.

Indeed, the modern suppression hearing, unknown at common law, is a type of objection to evidence such as took place at common law, and as takes place today in the case of nonconstitutional objections, in *open court* during trial. There is no federal requirement that States conduct suppression hearings prior to trial. See *Pinto* v. *Pierce*, 389 U. S. 31, 32 (1967). I assume that if such an objection were made during trial, it would be made in open court during the course of the public trial. I am unwilling to allow the temporal factor to control whether the public will be able to have access to the proceeding.

The Court also must believe that not even the accused has a right to a public pretrial suppression hearing. For if, as the Court assumes for the sake of argument, there is a public right to attend trials that the Sixth Amendment protects, it is difficult to see why, if that right does not extend to preliminary proceedings insofar as the public is concerned, it should extend to such proceedings insofar as the defendant

is concerned. And many of the precedents upon which the Court relies denied a public preliminary proceeding to the accused as well as to the public. *E. g.*, Indictable Offences Act, 11 & 12 Vict., ch. 42, § 17 (1848).

Alternatively, the Court finds that the right to a public trial is the right of the accused only, and that the public has no enforceable interest in public trials. Under this analysis, the defendant—so long as the prosecution and the judge agree—may surely close a full trial on the merits as well as a pretrial suppression hearing. The Court's analysis would thus allow closed trials as well without providing for any standards to insure that "the public['s] . . . right to be informed as to what occurs in its courts" has been protected. *Estes* v. *Texas*, 381 U. S., at 541.

I, for one, am unwilling to allow trials and suppression hearings to be closed with no way to ensure that the public interest is protected. Unlike the other provisions of the Sixth Amendment, the public-trial interest cannot adequately be protected by the prosecutor and judge in conjunction, or connivance, with the defendant. The specter of a trial or suppression hearing where a defendant of the same political party as the prosecutor and the judge—both of whom are elected officials perhaps beholden to the very defendant they are to try—obtains closure of the proceeding without any consideration for the substantial public interest at stake is sufficiently real to cause me to reject the Court's suggestion that the parties be given complete discretion to dispose of the public's interest as they see fit. The decision of the parties to close a proceeding in such a circumstance, followed by suppression of vital evidence or acquittal by the bench, destroys the appearance of justice and undermines confidence in the judicial system in a way no subsequent provision of transcript might remedy. But even where no connivance occurs, prosecutors and judges may have their own reasons for preferring a closed proceeding. And a prosecutor, who seeks to obtain a con-

viction free from error, and a judge who seeks the same while protecting the defendant's rights, may lack incentive to assert some notion of the public interest in the face of a motion by a criminal defendant to close a trial.

III

At the same time, I do not deny that the publication of information learned in an open proceeding may harm irreparably, under certain circumstances, the ability of a defendant to obtain a fair trial. This is especially true in the context of a pretrial hearing, where disclosure of information, determined to be inadmissible at trial, may severely affect a defendant's rights. Although the Sixth Amendment's public-trial provision establishes a strong presumption in favor of open proceedings, it does not require that all proceedings be held in open court when to do so would deprive a defendant of a fair trial.

No court has held that the Sixth Amendment imposes an absolute requirement that courts be open at all times. On the contrary, courts on both the state and federal levels have recognized exceptions to the public-trial requirement even when it is the accused who objects to the exclusion of the public or a portion thereof. Thus, it is clear that the court may exclude unruly spectators or limit the number of spectators. And in both *Estes* v. *Texas,* 381 U. S. 532 (1965), and *Sheppard* v. *Maxwell,* 384 U. S. 333 (1966), this Court held that a court may place restrictions on the access of the electronic media in particular, and certain types of newsgathering in general, inside the courthouse doors. There are a number of instances where the courts have gone further and upheld the exclusion of the public for limited periods of time. Examples are when it was necessary to preserve the confidentiality of the Government's "skyjacker profile," *United States* v. *Bell,* 464 F. 2d 667 (CA2), cert. denied, 409 U. S. 991 (1972), and when it was necessary to effectuate Congress' determination

that the confidentiality of communications intercepted under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. § 2510 *et seq.*, be preserved prior to the determination that such communications were lawfully intercepted. *United States* v. *Cianfrani*, 573 F. 2d 835 (CA3 1978).

I need express no opinion on the correctness of such decisions. But they illustrate that courts have been willing to permit limited exceptions to the principle of publicity where necessary to protect some other interest. Because of the importance we attach to a fair trial, it is clear that whatever restrictions on access the Sixth Amendment may prohibit in another context, it does not prevent a trial court from restricting access to a pretrial suppression hearing where such restriction is necessary in order to ensure that a defendant not be denied a fair trial as a result of prejudicial publicity flowing from that hearing.[16] See *Branzburg* v. *Hayes*, 408 U. S. 665, 685 (1972).

At the same time, however, the public's interest in maintaining open courts requires that any exception to the rule be narrowly drawn. It comports with the Sixth Amendment to require an accused who seeks closure to establish that it is strictly and inescapably necessary in order to protect the fair-trial guarantee. That finding must be made in the first instance, of course, by the trial court. I cannot detail here

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[16] This observation is confined to cases where the defendant seeks to close the hearing on the ground that his fair-trial rights will be infringed by an open proceeding. I express no opinion as to whether or when a proceeding subject to the command of the Sixth Amendment may be closed over the objection of the defendant. Nor need I determine what interests other than those of the defendant in a fair trial may support an order of closure. My comments are also confined to rulings within the ambit of the Sixth Amendment's public-trial provision. I thus express no opinion about proceedings, such as those in juvenile court, not otherwise subject to the requirement of the Sixth Amendment. See *McKeiver* v. *Pennsylvania*, 403 U. S. 528, 540–541 (1971) (plurality opinion.)

all the factors to be taken into account in evaluating the defendant's closure request, nor can I predict how the balance should be struck in every hypothetical case. The accused who seeks closure should establish, however, at a minimum the following:

First, he should provide an adequate basis to support a finding that there is a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public. This showing will depend on the facts. But I think it requires evidence of the nature and extent of the publicity prior to the motion to close in order to establish a basis for the trial court to conclude that further coverage will result in the harm sought to be prevented. In most cases, this will involve a showing of the impact on the jury pool. This seldom can be measured with exactness, but information relating to the size of the pool, the extent of media coverage in the pertinent locality, and the ease with which change of venire can be accomplished or searching *voir dire* instituted to protect against prejudice, would be relevant. The court also should consider the extent to which the information sought to be suppressed is already known to the public, and the extent to which publication of such information, if unknown, would have an impact in the context of the publicity that has preceded the motion to close.

Second, the accused should show a substantial probability that alternatives to closure will not protect adequately his right to a fair trial. One may suggest numerous alternatives, but I think the following should be considered: continuance, severance, change of venue, change of venire, *voir dire*, peremptory challenges, sequestration, and admonition of the jury. ABA Project on Standards for Criminal Justice, Fair Trial and Free Press, Standard 8–3.2, p. 16 (App. Draft 1978). See *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 562–565; *Sheppard* v. *Maxwell*, 384 U. S., at 354 n. 9, 358–362. One or more of these alternatives may adequately protect the ac-

cused's interests and relieve the court of any need to close the proceeding in advance.[17]

I note, too, that for suppression hearings alternatives to closure exist that would enable the public to attend but that would limit dissemination of the information sought to be suppressed. At most such hearings, the issues concern not so much the contents of a confession or of a wiretap, or the nature of the evidence seized, but the circumstances under which the prosecution obtained this material. Many hearings, with care, could be conducted in public with little risk that prejudicial information would be disclosed.

Third, the accused should demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm. Where significantly prejudicial information already has been made public, there might well be little justification for closing a pretrial hearing in order to prevent only the disclosure of details.

I emphasize that the trial court should begin with the assumption that the Sixth Amendment requires that a pre-

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[17] The Court suggests that the public's interest will be served adequately by permitting delayed access to the transcript of the closed proceeding once the danger to the accused's fair-trial right has dissipated. A transcript, however, does not always adequately substitute for presence at the proceeding itself. Also, the inherent delay may defeat the purpose of the public-trial requirement. Later events may crowd news of yesterday's proceeding out of the public view. "As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly." *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 561. Public access is restricted precisely at the time when public interest is at its height. *Bridges* v. *California*, 314 U. S. 252, 268 (1941). Moreover, an important event, such as a judicial election or the selection of a prosecuting attorney, may occur when the public is ignorant of the details of judicial and prosecutorial conduct. Finally, although a record is kept for later release, when the proceeding itself is kept secret, it is impossible to know what it would have been like had the pressure of publicity been brought to bear on the parties during the proceeding itself.

trial suppression hearing be conducted in open court unless a defendant carries his burden to demonstrate a strict and inescapable necessity for closure. There should be no need for a representative of the public to demonstrate that the public interest is legitimate or genuine, or that the public seeks access out of something more than mere curiosity. Trials and suppression hearings by their nature are events of legitimate public interest, and the public need demonstrate no threshold of respectability in order to attend. This is not to say, of course, that a court should not take into account heightened public interest in cases of unusual importance to the community or to the public at large. The prosecution of an important officeholder could intensify public interest in observing the proceedings, and the court should take that interest into account where it is warranted. It is also true, however, that as the public interest intensifies, so does the potential for prejudice.

As a rule, the right of the accused to a fair trial is compatible with the interest of the public in maintaining the publicity of pretrial proceedings. "In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right." *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 551. Our cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy* v. *Florida*, 421 U. S. 794, 799 (1975). A high level of publicity is not necessarily inconsistent with the ability of the defendant to obtain a fair trial where the publicity has been largely factual in nature, *id.*, at 802; *Beck* v. *Washington*, 369 U. S. 541, 542–545, 557–558 (1962), or where it abated some time prior to trial. See *Stroble* v. *California*, 343 U. S. 181, 191–194 (1952).

In those cases where a court has found publicity sufficiently prejudicial as to warrant reversal on due process grounds, the publicity went far beyond the normal bounds of

coverage. In *Irvin* v. *Dowd*, 366 U. S. 717 (1961), for example, there was a barrage of adverse publicity about the defendant's offer to plead guilty and his confession to several murders and burglaries. In *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), there was live pretrial television coverage of the defendant's confession. And in *Estes* v. *Texas*, 381 U. S. 532 (1965), and *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), the press, and especially the electronic media, intruded to such an extent on the courtroom proceedings that all semblance of decorum and sobriety was lost. See *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 551–556; *Murphy* v. *Florida*, 421 U. S., at 798–799.

But "[c]ases such as these are relatively rare." *Nebraska Press*, 427 U. S., at 554. All our decisions in this area, "[t]aken together, . . . demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Ibid.* These cases provide the background against which a trial judge must evaluate a motion to close a hearing on the ground that an open hearing will result in publicity so prejudicial that a defendant will be deprived of his due process right to a fair trial. In *Stroble*, *Murphy*, and *Beck*, of course, the sharpened vision of hindsight helped the Court to see that the trial had been fair notwithstanding the publicity. The trial judge faced with a closure motion has the more difficult task of looking into the future. I do not mean to suggest that only in the egregious circumstances of cases such as *Estes* and *Sheppard* would closure be permissible. But to some extent the harm that the defendant fears from publicity is also speculative.

If, after considering the essential factors, the trial court determines that the accused has carried his burden of establishing that closure is necessary, the Sixth Amendment is no barrier to reasonable restrictions on public access designed to meet that need. Any restrictions imposed, however, should extend no further than the circumstances reasonably require.

Thus, it might well be possible to exclude the public from only those portions of the proceeding at which the prejudicial information would be disclosed, while admitting to other portions where the information the accused seeks to suppress would not be revealed. *United States* v. *Cianfrani*, 573 F. 2d, at 854. Further, closure should be temporary in that the court should ensure that an accurate record is made of those proceedings held *in camera* and that the public is permitted proper access to the record as soon as the threat to the defendant's fair-trial right has passed.

I thus reject the suggestion that the defendant alone may determine when closure should occur. I also reject any notion that the decision whether to permit closure should be in the hands of the prosecutor on the theory that he is the representative of the public's interest. It is in part the public's interest in observing the conduct of the prosecutor, and the police with whom he is closely associated, that the public-trial provision serves. To cloak his own actions or those of his associates from public scrutiny, a prosecutor thus may choose to close a hearing where the facts do not warrant it. Moreover, prosecutors often are elected, and the public has a strong interest, as noted, in observing the conduct of elected officials. In addition, the prosecutor may fear reversal on appeal if he too strenuously resists the motion of a defendant to close a hearing. Conversely, a prosecutor may wrap in the mantle of the public interest his desire to disseminate prejudicial information about an accused prior to trial, and so resist a motion to close where the circumstances warrant some restrictions on access. I thus am unwilling to commit to the discretion of the prosecutor, against whose own misconduct or incompetence the public-trial requirement is designed in part to protect, the decision as to whether an accused's motion to close will be granted.

As a final safeguard, I would conclude that any person removed from a court should be given a reasonable opportunity to

state his objections prior to the effectiveness of the order. This opportunity need not take the form of an evidentiary hearing; it need not encompass extended legal argument that results in delay; and the public need not be given prior notice that a closure order will be considered at a given time and place. But where a member of the public contemporaneously objects, the court should provide a reasonable opportunity to that person to state his objection. Finally, the court should state on the record its findings concerning the need for closure so that a reviewing court may be adequately informed.

IV

The Sixth Amendment, in establishing the public's right of access to a criminal trial and a pretrial proceeding, also fixes the rights of the press in this regard. Petitioner, as a newspaper publisher, enjoys the same right of access to the *Jackson* v. *Denno* hearing at issue in this case as does the general pub'ic. And what petitioner sees and hears in the courtroom it may, like any other citizen, publish or report consistent with the First Amendment. "Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." *Sheppard* v. *Maxwell*, 384 U. S., at 362–363. Reporters for newspaper, television, and radio "are entitled to the same rights as the general public" to have access to the courtroom, *Estes* v. *Texas*, 381 U. S., at 540, where they "are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media." *Id.*, at 541–542. "[O]nce a public hearing ha[s] been held, what transpired there could not be subject to prior restraint." *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 568.

Petitioner acknowledges that it seeks no greater rights than those due the general public. But it argues that, the Sixth Amendment aside, the First Amendment protects the free flow of information about judicial proceedings, and that this flow may not be cut off without meeting the standards required to

justify the imposition of a prior restraint under the First Amendment. Specifically, petitioner argues that the First Amendment prohibits closure of a pretrial proceeding except in accord with the standards established in *Nebraska Press* and only after notice and hearing and a stay pending appeal.

I do not agree. As I have noted, this case involves no restraint upon publication or upon comment about information already in the possession of the public or the press. It involves an issue of access to a judicial proceeding. To the extent the Constitution protects a right of public access to the proceeding, the standards enunciated under the Sixth Amendment suffice to protect that right. I therefore need not reach the issue of First Amendment access.

V

I return to the exclusion order entered by Judge DePasquale. It is clear that the judge entered the order because of his apparent concern for the fair-trial rights of the defendants and his suspicion that those rights would be threatened if the hearing were public. I acknowledge that concern, but I conclude that the order was not justified on the facts of this case.

There was no factual basis upon which the court could conclude that a substantial probability existed that an open proceeding would result in harm to the defendants' rights to a fair trial. The coverage in petitioner's newspapers of Clapp's disappearance and the subsequent arrest and prosecution of Greathouse and Jones was circumspect. Stories appeared on only 7 of the 18 days between July 20 and August 6. All coverage ceased on August 6 and did not resume until after the suppression hearing three months later. The stories that appeared were largely factual in nature. The reporting was restrained and free from editorializing or sensationalism. There was no screaming headline, no lurid photograph, no front-page overemphasis. The stories were of moderate length and were linked to factual developments in the case. And

petitioner's newspapers had only a small circulation in Seneca County. See n. 1, *ante*, of the Court's opinion.

In addition, counsel for respondents stated that the only fact not known to petitioner prior to the suppression hearing was the content of the confessions. Tr. of Oral Arg. 40. Prior to the hearing, petitioner had learned of the confessions and of the existence and nature of the physical evidence sought to be suppressed. It is thus not at all likely that the openness of the suppression hearing would have resulted in the divulgence of additional information that would have made it more probable that Greathouse and Jones would be denied a fair trial.

On this record, I cannot conclude, as a matter of law, that there was a sufficient showing to establish the strict and inescapable necessity that supports an exclusion order. The circumstances also would not have justified a holding by the trial court that there was substantial probability that alternatives to closure would not have sufficed to protect the rights of the accused.

It has been said that publicity "is the soul of justice." J. Bentham, A Treatise on Judicial Evidence 67 (1825). And in many ways it is: open judicial processes, especially in the criminal field, protect against judicial, prosecutorial, and police abuse; provide a means for citizens to obtain information about the criminal justice system and the performance of public officials; and safeguard the integrity of the courts. Publicity is essential to the preservation of public confidence in the rule of law and in the operation of courts. Only in rare circumstances does this principle clash with the rights of the criminal defendant to a fair trial so as to justify exclusion. The Sixth and Fourteenth Amendments require that the States take care to determine that those circumstances exist before excluding the public from a hearing to which it otherwise is entitled to come freely. Those circumstances did not exist in this case.

Syllabus

COLUMBUS BOARD OF EDUCATION ET AL. *v.* PENICK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-610. Argued April 24, 1979—Decided July 2, 1979

This class action was brought in 1973 by students in the Columbus, Ohio, school system, charging that the Columbus Board of Education (Board) and its officials had pursued and were pursuing a course of conduct having the purpose and effect of causing and perpetuating racial segregation in the public schools, contrary to the Fourteenth Amendment. The case was ultimately tried in April-June 1976, final arguments were heard in September 1976, and in March 1977 the District Court filed an opinion and order containing its findings of fact and conclusions of law. It found (1) that in 1954, when *Brown* v. *Board of Education*, 347 U. S. 483 (*Brown I*), was decided, the Board was not operating a racially neutral unitary school system, but was conducting "an enclave of separate, black schools on the near east side of Columbus" and that this was "the direct result of cognitive acts or omissions of those school board members and administrators who had originally intentionally caused and later perpetuated the racial isolation"; (2) that since the decision in *Brown* v. *Board of Education*, 349 U. S. 294 (*Brown II*), the Board had been under a continuous constitutional obligation to disestablish its dual system and that it has failed to discharge this duty; and (3) that in the intervening years since 1954 there had been a series of Board actions and practices that could not "reasonably be explained without reference to racial concerns" and that "intentionally aggravated, rather than alleviated," racial separation in the schools. Ultimately concluding that at the time of trial the racial segregation in the Columbus school system "directly resulted from [the Board's] intentional segregative acts and omissions," in violation of the Equal Protection Clause of the Fourteenth Amendment, the court, accordingly, enjoined the defendants from continuing to discriminate on the basis of race in operating the public schools and ordered the submission of a systemwide desegregation plan. Subsequently, following the decision in *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (*Dayton I*), the District Court rejected the Board's argument that that decision required or permitted modification of the court's finding or judgment. Based on its examination of the record, the Court of Appeals affirmed the judgments against the defendants.

Held:

1. On the record, there is no apparent reason to disturb the findings and conclusions of the District Court, affirmed by the Court of Appeals, that the Board's conduct at the time of trial and before not only was animated by an unconstitutional, segregative purpose, but also had current segregative impact that was sufficiently systemwide to warrant the remedy ordered by the District Court. Pp. 454–463.

(a) Proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system is itself prima facie proof of a dual system and supports a finding to this effect absent sufficient contrary proof by the Board, which was not forthcoming in this case. Pp. 455–458.

(b) The Board's continuing affirmative duty to disestablish the dual school system, mandated by *Brown II*, is beyond question, and there is nothing in the record to show that at the time of trial the dual school system in Columbus and its effects had been disestablished. Pp. 458–461.

2. There is no indication that the judgments below rested on any misapprehension of the controlling law. Pp. 463–468.

(a) Where it appears that the District Court, while recognizing that disparate impact and foreseeable consequences, without more, do not establish a constitutional violation, correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact of a forbidden purpose, the court stayed well within the requirements of *Washington* v. *Davis*, 426 U. S. 229, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, that a plaintiff seeking to make out an equal protection violation on the basis of racial discrimination must show purpose. Pp. 464–465.

(b) Where the District Court repeatedly emphasized that it had found purposefully segregative practices with current, systemwide impact, there was no failure to observe the requirements of *Dayton I*, that the remedy imposed by a court of equity should be commensurate with the violation ascertained. Pp. 465–467.

(c) Nor was there any misuse of *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, where it was held that purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a systemwide discriminatory intent unless otherwise rebutted and that given the purpose to operate a dual school system one could infer a connection between such purpose and racial separation in other parts of the school system. Pp. 467–468.

583 F. 2d 787, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 468. STEWART, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined, *post*, p. 469. POWELL, J., filed a dissenting opinion, *post*, p. 479. REHNQUIST, J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 489.

Samuel H. Porter argued the cause for petitioners. With him on the briefs were *Earl F. Morris* and *Curtis A. Loveland.*

Thomas I. Atkins argued the cause for respondents. With him on the brief were *Richard M. Stein, William L. Taylor, Nathaniel R. Jones, Louis R. Lucas, William E. Caldwell, Paul R. Dimond, Robert A. Murphy, Richard S. Kohn,* and *Norman J. Chachkin. Mark O'Neill* filed a brief for the Ohio State Board of Education et al. as respondents under this Court's Rule 21 (4).

Assistant Attorney General Days argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Wallace, Sara Sun Beale, Brian K. Landsberg,* and *Robert J. Reinstein.**

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*Briefs of *amici curiae* urging reversal were filed by *Richard S. Gebelein,* Attorney General of Delaware, *Regina M. Small,* Deputy Attorney General, *Mason E. Turner, Jr., James T. McKinstry,* and *Philip B. Kurland* for the Delaware State Board of Education et al.; and by *Charles E. Brown* and *Ira Owen Kane* for the Neighborhood School Coordinating Committee et al.

Briefs of *amici curiae* urging affirmance were filed by *Burt Neuborne, E. Richard Larson, Robert Allen Sedler, Winn Newman,* and *Carole W. Wilson* for the American Civil Liberties Union et al.; by *Arthur J. Lesemann* for the Fair Housing Council of Bergen County, N. J.; by *Jack Greenberg, James M. Nabrit III, Bill Lann Lee, Joseph L. Rauh, Jr., John Silard, Elliott C. Lichtman,* and *John Fillion* for the NAACP Legal Defense and Educational Fund, Inc., et al.; and by *Stephen J. Pollak, Richard M. Sharp, Wendy S. White,* and *David Rubin* for the National Education Association et al.

Briefs of *amici curiae* were filed by *Harriet F. Pilpel, Nathan Z. Dershowitz,* and *Joseph B. Robison* for the American Jewish Congress; and by *Duane W. Krohnke* for Special School District No. 1, Minneapolis, Minn.

MR. JUSTICE WHITE delivered the opinion of the Court.

The public schools of Columbus, Ohio, are highly segregated by race. In 1976, over 32% of the 96,000 students in the system were black. About 70% of all students attended schools that were at least 80% black or 80% white. 429 F. Supp. 229, 240 (SD Ohio 1977). Half of the 172 schools were 90% black or 90% white. 583 F. 2d 787, 800 (CA6 1978). Fourteen named students in the Columbus school system brought this case on June 21, 1973, against the Columbus Board of Education, the State Board of Education, and the appropriate local and state officials.[1] The second amended complaint, filed on October 22, 1974, charged that the Columbus defendants had pursued and were pursuing a course of conduct having the purpose and effect of causing and perpetuating segregation in the public schools, contrary to the Fourteenth Amendment. A declaratory judgment to this effect and appropriate injunctive relief were prayed. Trial of the case began more than a year later, consumed 36 trial days, produced a record containing over 600 exhibits and a transcript in excess of 6,600 pages, and was completed in June 1976. Final arguments were heard in September, and in March 1977 the District Court filed an opinion and order containing its findings of fact and conclusions of law. 429 F. Supp. 229.

The trial court summarized its findings:

> "From the evidence adduced at trial, the Court has found earlier in this opinion that the Columbus Public Schools were openly and intentionally segregated on the basis of race when *Brown* [v. *Board of Education*, 347 U. S. 483 (*Brown I*)] was decided in 1954. The Court has found that the Columbus Board of Education never actively set out to dismantle this dual system. The Court has found that until legal action was initiated by the

[1] A similar group of plaintiffs was allowed to intervene, and the original plaintiffs were allowed to file an amended complaint that was certified as a class action. 429 F. Supp. 229, 233–234 (SD Ohio 1977); App. 50.

> Columbus Area Civil Rights Council, the Columbus Board did not assign teachers and administrators to Columbus schools at random, without regard for the racial composition of the student enrollment at those schools. The Columbus Board even in very recent times . . . has approved optional attendance zones, discontiguous attendance areas and boundary changes which have maintained and enhanced racial imbalance in the Columbus Public Schools. The Board, even in very recent times and after promising to do otherwise, has adjured [*sic*] workable suggestions for improving the racial balance of city schools.
>
> "Viewed in the context of segregative optional attendance zones, segregative faculty and administrative hiring and assignments, and the other such actions and decisions of the Columbus Board of Education in recent and remote history, it is fair and reasonable to draw an inference of segregative intent from the Board's actions and omissions discussed in this opinion." *Id.*, at 260–261.

The District Court's ultimate conclusion was that at the time of trial the racial segregation in the Columbus school system "directly resulted from [the Board's] intentional segregative acts and omissions," *id.*, at 259, in violation of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, judgment was entered against the local and state defendants enjoining them from continuing to discriminate on the basis of race in operating the Columbus public schools and ordering the submission of a systemwide desegregation plan.

Following decision by this Court in *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (*Dayton I*), in June 1977, and in response to a motion by the Columbus Board, the District Court rejected the argument that *Dayton I* required or permitted any modification of its findings or judgment. It reiterated its conclusion that the Board's " 'liability in this case concerns the Columbus School District as a whole,' " App. to Pet. for Cert. 94, quoting 429 F. Supp., at 266, asserting that,

although it had "no real interest in any remedy plan which is more sweeping than necessary to correct the constitutional wrongs plaintiffs have suffered," neither would it accept any plan "which fails to take into account the systemwide nature of the liability of the defendants." App. to Pet. for Cert. 95. The Board subsequently presented a plan that complied with the District Court's guidelines and that was embodied in a judgment entered on October 7. The plan was stayed pending appeal to the Court of Appeals.

Based on its own examination of the extensive record, the Court of Appeals affirmed the judgments entered against the local defendants.[2] 583 F. 2d 787. The Court of Appeals could not find the District Court's findings of fact clearly erroneous. *Id.*, at 789. Indeed, the Court of Appeals examined in detail each set of findings by the District Court and found strong support for them in the record. *Id.*, at 798, 804, 805, 814. The Court of Appeals also discussed in detail and found unexceptionable the District Court's understanding and application of the Fourteenth Amendment and the cases construing it.

Implementation of the desegregation plan was stayed pending our disposition of the case. 439 U. S. 1348 (1978) (REHNQUIST, J., in chambers). We granted the Board's petition for certiorari, 439 U. S. 1066 (1979), and we now affirm the judgment of the Court of Appeals.

I

The Board earnestly contends that when this case was brought and at the time of trial its operation of a segregated school system was not done with any general or specific racially discriminatory purpose, and that whatever unconsti-

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[2] The Court of Appeals vacated the judgment against the state defendants and remanded for further proceedings regarding those parties. 583 F. 2d 787, 815–818 (CA6 1978). No issue with respect to the state defendants is before us now.

tutional conduct it may have been guilty of in the past such conduct at no time had systemwide segregative impact and surely no remaining systemwide impact at the time of trial. A systemwide remedy was therefore contrary to the teachings of the cases, such as *Dayton I*, that the scope of the constitutional violation measures the scope of the remedy.[3]

We have discovered no reason, however, to disturb the judgment of the Court of Appeals, based on the findings and conclusions of the District Court, that the Board's conduct at the time of trial and before not only was animated by an unconstitutional, segregative purpose, but also had current, segregative impact that was sufficiently systemwide to warrant the remedy ordered by the District Court.

These ultimate conclusions were rooted in a series of constitutional violations that the District Court found the Board to have committed and that together dictated its judgment and decree. In each instance, the Court of Appeals found the District Court's conclusions to be factually and legally sound.

A

First, although at least since 1888 there had been no statutory requirement or authorization to operate segregated schools,[4] the District Court found that in 1954, when *Brown* v.

[3] Petitioners also argue that the District Court erred in requiring that every school in the system be brought roughly within proportionate racial balance. We see no misuse of mathematical ratios under our decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 22–25 (1971), especially in light of the Board's failure to justify the continued existence of "some schools that are all or predominantly of one race . . . ." *Id.*, at 26; see App. to Pet. for Cert. 102–103. Petitioners do not otherwise question the remedy if a systemwide violation was properly found.

[4] In 1871, pursuant to the requirements of state law, Columbus maintained a complete separation of the races in the public schools. 429 F. Supp., at 234–235. The Ohio Supreme Court ruled in 1888 that state law no longer required or permitted the segregation of schoolchildren. *Board of Education* v. *State*, 45 Ohio St. 555, 16 N. E. 373. Even prior to that, in 1881, the Columbus Board abolished its separate schools for

Board of Education, 347 U. S. 483 (*Brown I*), was decided, the Columbus Board was not operating a racially neutral, unitary school system, but was conducting "an enclave of separate, black schools on the near east side of Columbus," and that "[t]he then-existing racial separation was the direct result of cognitive acts or omissions of those school board members and administrators who had originally intentionally caused and later perpetuated the racial isolation . . . ." 429 F. Supp., at 236. Such separateness could not "be said to have been the result of racially neutral official acts." *Ibid.*

Based on its own examination of the record, the Court of Appeals agreed with the District Court in this respect, observing that, "[w]hile the Columbus school system's dual black-white character was not mandated by state law as of 1954, the record certainly shows intentional segregation by the Columbus Board. As of 1954 the Columbus School Board had 'carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system.'" 583 F. 2d, at 798–799, quoting *Keyes* v. *School Dist. No. 1, Denver, Colo.,* 413 U. S. 189, 201–202 (1973).

The Board insists that, since segregated schooling was not commanded by state law and since not all schools were wholly black or wholly white in 1954, the District Court was not war-

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black and white students, but by the end of the first decade of this century it had returned to a segregated school policy. Champion Avenue School was built in 1909 in a predominantly black area and was completely staffed with black teachers. Other black schools were established as the black population grew. The Board gerrymandered attendance zones so that white students who lived near these schools were assigned to or could attend white schools, which often were further from their homes. By 1943, a total of five schools had almost exclusively black student bodies, and each was assigned an all-black faculty, often through all-white to all-black faculty transfers that occurred each time the Board came to consider a particular school as a black school. 429 F. Supp., at 234–236.

ranted in finding a dual system.[5] But the District Court found that the "Columbus Public Schools were *officially* segregated by race in 1954," App. to Pet. for Cert. 94 (emphasis added);[6] and in any event, there is no reason to question the finding that as the "direct result of cognitive acts or omissions" the

[5] Both our dissenting Brethren and the separate concurrence of MR. JUSTICE STEWART put great weight on the absence of a statutory mandate or authorization to discriminate, but the Equal Protection Clause was aimed at all official actions, not just those of state legislatures. "[N]o agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Ex parte Virginia*, 100 U. S. 339, 347 (1880). Thus, in *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), the discriminatory application of an ordinance fair on its face was found to be unconstitutional state action. Even actions of state agents that may be illegal under state law are attributable to the State. *United States* v. *Price*, 383 U. S. 787 (1966); *Screws* v. *United States*, 325 U. S. 91 (1945). Our decision in *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189 (1973), plainly demonstrates in the educational context that there is no magical difference between segregated schools mandated by statute and those that result from local segregative acts and policies. The presence of a statute or ordinance commanding separation of the races would ease the plaintiff's problems of proof, but here the District Court found that the local officials, by their conduct and policies, had maintained a dual school system in violation of the Fourteenth Amendment. The Court of Appeals agreed, and we fail to see why there should be a lesser constitutional duty to eliminate that system than there would have been had the system been ordained by law.

[6] The dissenters in this case claim a better grasp of the historical and ultimate facts than the two courts below had. But on the issue of whether there was a dual school system in Columbus, Ohio, in 1954, on the record before us we are much more impressed by the views of the judges who have lived with the case over the years. Also, our dissenting Brothers' suggestion that this Court should play a special oversight role in reviewing the factual determinations of the lower courts in school desegregation cases, *post*, at 491–492 (REHNQUIST, J., dissenting), asserts an omnipotence and omniscience that we do not have and should not claim.

Board maintained "an enclave of separate, black schools on the near east side of Columbus." 429 F. Supp., at 236. Proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board, which was not forthcoming in this case. *Keyes, supra,* at 203.[7]

B

Second, both courts below declared that since the decision in *Brown* v. *Board of Education,* 349 U. S. 294 (1955) (*Brown II*), the Columbus Board has been under a continuous constitutional obligation to disestablish its dual school system and that it has failed to discharge this duty. App. to Pet. for Cert. 94; 583 F. 2d, at 799. Under the Fourteenth Amendment and the cases that have construed it, the Board's duty to dismantle its dual system cannot be gainsaid.

Where a racially discriminatory school system has been found to exist, *Brown II* imposes the duty on local school boards to "effectuate a transition to a racially nondiscriminatory school system." 349 U. S., at 301. "*Brown II* was a call for the dismantling of well-entrenched dual systems," and school boards operating such systems were "clearly charged

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[7] It is argued that *Dayton I,* 433 U. S. 406 (1977), implicitly overruled or limited those portions of *Keyes* and *Swann* approving, in certain circumstances, inferences of general, systemwide purpose and current, systemwide impact from evidence of discriminatory purpose that has resulted in substantial current segregation, and approving a systemwide remedy absent a showing by the defendant of what part of the current imbalance was not caused by the constitutional breach. *Dayton I* does not purport to disturb any aspect of *Keyes* and *Swann;* indeed, it cites both cases with approval. On the facts found by the District Court and affirmed by the Court of Appeals at the time *Dayton* first came before us, there were only isolated instances of intentional segregation, which were insufficient to give rise to an inference of systemwide institutional purpose and which did not add up to a facially substantial systemwide impact. *Dayton Board of Education* v. *Brinkman* (*Dayton II*), *post,* at 531, and n. 5.

with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* v. *County School Board,* 391 U. S. 430, 437–438 (1968). Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment. *Dayton I,* 433 U. S., at 413–414; *Wright* v. *Council of City of Emporia,* 407 U. S. 451, 460 (1972); *United States* v. *Scotland Neck Board of Education,* 407 U. S. 484 (1972) (creation of a new school district in a city that had operated a dual school system but was not yet the subject of court-ordered desegregation).

The *Green* case itself was decided 13 years after *Brown II.* The core of the holding was that the school board involved had not done enough to eradicate the lingering consequences of the dual school system that it had been operating at the time *Brown I* was decided. Even though a freedom-of-choice plan had been adopted, the school system remained essentially a segregated system, with many all-black and many all-white schools. The board's continuing obligation, which had not been satisfied, was " 'to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed.' " *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 13 (1971), quoting *Green, supra,* at 439 (emphasis in original).

As THE CHIEF JUSTICE's opinion for a unanimous Court in *Swann* recognized, *Brown* and *Green* imposed an affirmative duty to desegregate. "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. . . . In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." 402 U. S., at 15–16. In *Swann,* it should be recalled, an initial desegregation plan had been entered in 1965 and had been affirmed on appeal. But the case was reopened, and in 1969 the school board was required to come

forth with a more effective plan. The judgment adopting the ultimate plan was affirmed here in 1971, 16 years after *Brown II*.

In determining whether a dual school system has been disestablished, *Swann* also mandates that matters aside from student assignments must be considered:

> "[W]here it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." 402 U. S., at 18.

Further, *Swann* stated that in devising remedies for legally imposed segregation the responsibility of the local authorities and district courts is to ensure that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual school system. *Id.*, at 20–21. As for student assignments, the Court said:

> "No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory." *Id.*, at 26.

The Board's continuing "affirmative duty to disestablish the dual school system" is therefore beyond question, *McDaniel*

v. *Barresi*, 402 U. S. 39, 41 (1971), and it has pointed to nothing in the record persuading us that at the time of trial the dual school system and its effects had been disestablished. The Board does not appear to challenge the finding of the District Court that at the time of trial most blacks were still going to black schools and most whites to white schools. Whatever the Board's current purpose with respect to racially separate education might be, it knowingly continued its failure to eliminate the consequences of its past intentionally segregative policies. The Board "never actively set out to dismantle this dual system." 429 F. Supp., at 260.

C

Third, the District Court not only found that the Board had breached its constitutional duty by failing effectively to eliminate the continuing consequences of its intentional systemwide segregation in 1954, but also found that in the intervening years there had been a series of Board actions and practices that could not "reasonably be explained without reference to racial concerns," *id.*, at 241, and that "intentionally aggravated, rather than alleviated," racial separation in the schools. App. to Pet. for Cert. 94. These matters included the general practice of assigning black teachers only to those schools with substantial black student populations, a practice that was terminated only in 1974 as the result of a conciliation agreement with the Ohio Civil Rights Commission; the intentionally segregative use of optional attendance zones,[8] discon-

[8] Despite petitioners' avowedly strong preference for neighborhood schools, in times of residential racial transition the Board created optional attendance zones to allow white students to avoid predominantly black schools, which were often closer to the homes of the white pupils. For example, until well after the time the complaint was filed, petitioners allowed students in "a small, white enclave on Columbus' predominantly black near-east side . . . to escape attendance at black" schools. 429 F. Supp., at 244. The court could perceive no racially neutral reasons for this optional zone. *Id.*, at 245. "Quite frankly, the Near-Bexley Option

tiguous attendance areas,[9] and boundary changes; [10] and the selection of sites for new school construction that had the foreseeable and anticipated effect of maintaining the racial separation of the schools.[11] The court generally noted that

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appears to this Court to be a classic example of a segregative device designed to permit white students to escape attendance at predominantly black schools." *Ibid.*

[9] This technique was applied when neighborhood schools would have tended to desegregate the involved schools. In the 1960's, a group of white students were bused past their neighborhood school to a "whiter" school. The District Court could "discern no other explanation than a racial one for the existence of the Moler discontiguous attendance area for the period 1963 through 1969." *Id.*, at 247. From 1957 until 1963, students living in a predominantly white area near Heimandale Elementary School attended a more remote, but identifiably white school. *Id.*, at 247–248.

[10] Gerrymandering of boundary lines also continued after 1954. The District Court found, for instance, that for one area on the west side of the city containing three white schools and one black school the Board had altered the lines so that white residential areas were removed from the black school's zone and black students were contained within that zone. *Id.*, at 245–247. The Court found that the segregative choice of lines was not justified "as a matter of academic administration" and "had a substantial and continuing segregative impact upon these four west side schools." *Id.*, at 247.

Another example involved the former Mifflin district that had been absorbed into the Columbus district. The Board staff presented two alternative means of drawing necessary attendance zones: one that was desegregative and one that was segregative. The Board chose the segregative option, and the District Court was unpersuaded that it had any legitimate educational reasons for doing so. *Id.*, at 248–250.

[11] The District Court found that, of the 103 schools built by the Board between 1950 and 1975, 87 opened with racially identifiable student bodies and 71 remained that way at the time of trial. This result was reasonably foreseeable under the circumstances in light of the sites selected, and the Board was often specifically warned that it was, without apparent justification, choosing sites that would maintain or further segregation. *Id.*, at 241–243. As the Court of Appeals noted:

"[T]his record actually requires no reliance upon inference, since, as indicated above, it contains repeated instances where the Columbus Board was

"[s]ince the 1954 *Brown* decision, the Columbus defendants or their predecessors were adequately put on notice of the fact that action was required to correct and to prevent the increase in" segregation, yet failed to heed their duty to alleviate racial separation in the schools. 429 F. Supp., at 255.[12]

II

Against this background, we cannot fault the conclusion of the District Court and the Court of Appeals that at the time of trial there was systemwide segregation in the Columbus schools that was the result of recent and remote intention-

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warned of the segregative effect of proposed site choices, and was urged to consider alternatives which could have had an integrative effect. In these instances the Columbus Board chose the segregative sites. In this situation the District Judge was justified in relying in part on the history of the Columbus Board's site choices and construction program in finding deliberate and unconstitutional systemwide segregation." 583 F. 2d, at 804.

[12] Local community and civil rights groups, the "Ohio State University Advisory Commission on Problems Facing the Columbus Public Schools, and officials of the Ohio State Board of Education all called attention to the problem [of segregation] and made certain curative recommendations." 429 F. Supp., at 255. This was particularly important because the Columbus system grew rapidly in terms of geography and number of students, creating many crossroads where the Board could either turn toward segregation or away from it. See *id.*, at 243. Specifically, for example, the University Commission in 1968 made certain recommendations that it thought not only would assist desegregation of the schools but also would encourage integrated residential patterns. *Id.*, at 256. The Board itself came to similar conclusions about what could be done, but its response was "minimal." *Ibid.* See also *id.*, at 264. Additionally, the Board refused to create a site-selection advisory group to assist in avoiding sites with a segregative effect, refused to ask state education officials to present plans for desegregating the Columbus public schools, and refused to apply for federal desegregation-assistance funds. *Id.*, at 257; see *id.*, at 239. The District Court drew "the inference of segregative intent from the Columbus defendants' failures, after notice, to consider predictable racial consequences of their acts and omissions when alternatives were available which would have eliminated or lessened racial imbalance." *Id.*, at 240.

ally segregative actions of the Columbus Board. While appearing not to challenge most of the subsidiary findings of historical fact, Tr. of Oral Arg. 7, petitioners dispute many of the factual inferences drawn from these facts by the two courts below. On this record, however, there is no apparent reason to disturb the factual findings and conclusions entered by the District Court and strongly affirmed by the Court of Appeals after its own examination of the record.

Nor do we discern that the judgments entered below rested on any misapprehension of the controlling law. It is urged that the courts below failed to heed the requirements of *Keyes, Washington* v. *Davis,* 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp* 429 U. S. 252 (1977), that a plaintiff seeking to make out an equal protection violation on the basis of racial discrimination must show purpose. Both courts, it is argued, considered the requirement satisfied if it were shown that disparate impact would be the natural and foreseeable consequence of the practices and policies of the Board, which, it is said, is nothing more than equating impact with intent, contrary to the controlling precedent.

The District Court, however, was amply cognizant of the controlling cases. It is understood that to prevail the plaintiffs were required to " 'prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action,' " 429 F. Supp., at 251, quoting *Keyes,* 413 U. S., at 198—that is, that the school officials had "intended to segregate." 429 F. Supp., at 254. See also 583 F. 2d, at 801. The District Court also recognized that under those cases disparate impact and foreseeable consequences, without more, do not establish a constitutional violation. See, *e. g.,* 429 F. Supp., at 251. Nevertheless, the District Court correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. Those cases do not forbid "the foreseeable

effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn." *Id.*, at 255. Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." *Ibid.* The District Court thus stayed well within the requirements of *Washington* v. *Davis* and *Arlington Heights.* See *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U. S. 256, 279 n. 25 (1979).

It is also urged that the District Court and the Court of Appeals failed to observe the requirements of our recent decision in *Dayton I,* which reiterated the accepted rule that the remedy imposed by a court of equity should be commensurate with the violation ascertained, and held that the remedy for the violations that had then been established in that case should be aimed at rectifying the "incremental segregative effect" of the discriminatory acts identified.[13] In *Dayton I,* only a few apparently isolated discriminatory practices had

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[13] Petitioners have indicated that a few of the recent violations specifically discussed by the District Court involved so few students and lasted for such a short time that they are unlikely to have any current impact. But that contention says little or nothing about the incremental impact of systemwide practices extending over many years. Petitioners also argue that because many of the involved schools were in areas that had become predominantly black residential areas by the time of trial, the racial separation in the schools would have occurred even without the unlawful conduct of petitioners. But, as the District Court found, petitioners' evidence in this respect was insufficient to counter respondents' proof. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 271 n. 21 (1977); *Mt. Healthy City Bd. of Education* v. *Doyle,* 429 U. S. 274, 287 (1977). And the phenomenon described by petitioners seems only to confirm, not disprove, the evidence accepted by the District Court that school segregation is a contributing cause of housing segregation. 429 F. Supp., at 259; see *Keyes,* 413 U. S., at 202–203; *Swann,* 402 U. S., at 20–21.

been found;[14] yet a systemwide remedy had been imposed without proof of a systemwide impact. Here, however, the District Court repeatedly emphasized that it had found purposefully segregative practices with current, systemwide impact.[15] 429 F. Supp., at 252, 259–260, 264, 266; App. to Pet. for Cert. 95; 583 F. 2d, at 799.[16] And the Court of Appeals, responding to similar arguments, said:

"School board policies of systemwide application neces-

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[14] Although the District Court in this case discussed in its major opinion a number of specific instances of purposeful segregation, it made it quite clear that its broad findings were not limited to those instances: "Viewing the Court's March 8 findings in their totality, this case does not rest on three specific violations, or eleven, or any other specific number. It concerns a school board which since 1954 has by its official acts intentionally aggravated, rather than alleviated, the racial imbalance of the public schools it administers. These were not the facts of the Dayton case." App. to Pet. for Cert. 94.

[15] MR. JUSTICE REHNQUIST's dissent erroneously states that we have "reliev[ed] school desegregation plaintiffs from any showing of a causal nexus between intentional segregative actions and the conditions they seek to remedy." *Post*, at 501. As we have expressly noted, both the District Court and the Court of Appeals found that the Board's purposefully discriminatory conduct and policies had current, systemwide impact—an essential predicate, as both courts recognized, for a systemwide remedy. Those courts reveal a much more knowledgeable and reliable view of the facts and of the record than do our dissenting Brethren.

[16] "For example, there is little dispute that Champion, Felton, Mt. Vernon, Pilgrim and Garfield were de jure segregated by direct acts of the Columbus defendants' predecessors. They were almost completely segregated in 1954, 1964, 1974 and today. Nothing has occurred to substantially alleviate that continuity of discrimination of thousands of black students over the intervening decades." 429 F. Supp., at 260 (footnote omitted).

"The finding of liability in this case concerns the Columbus school district as a whole. Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter. '[I]t is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating "feeder" schools on the basis of race has the reciprocal effect of keeping

sarily have systemwide impact. 1) The pre-1954 policy of creating an enclave of five schools intentionally designed for black students and known as 'black' schools, as found by the District Judge, clearly had a 'substantial'—indeed, a systemwide—impact. 2) The post-1954 failure of the Columbus Board to desegregate the school system in spite of many requests and demands to do so, of course, had systemwide impact. 3) So, too, did the Columbus Board's segregative school construction and siting policy as we have detailed it above. 4) So too did its student assignment policy which, as shown above, produced the large majority of racially identifiable schools as of the school year 1975–76. 5) The practice of assigning black teachers and administrators only or in large majority to black schools likewise represented a systemwide policy of segregation. This policy served until July 1974 to deprive black students of opportunities for contact with and learning from white teachers, and conversely to deprive white students of similar opportunities to meet, know and learn from black teachers. It also served as discriminatory, systemwide racial identification of schools." 583 F. 2d, at 814.

Nor do we perceive any misuse of *Keyes*, where we held that purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a systemwide discriminatory intent unless otherwise rebutted, and that given the purpose to operate a dual school system one could infer a connection between such a purpose and racial

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other nearby schools predominantly white.' *Keyes*[, *supra*, at 201]. The evidence in this case and the factual determinations made earlier in this opinion support the finding that those elementary, junior, and senior high schools in the Columbus school district which presently have a predominantly black student enrollment have been substantially and directly affected by the intentional acts and omissions of the defendant local and state school boards." *Id.*, at 266.

separation in other parts of the school system. There was no undue reliance here on the inferences permitted by *Keyes*, or upon those recognized by *Swann*. Furthermore, the Board was given ample opportunity to counter the evidence of segregative purpose and current, systemwide impact, and the findings of the courts below were against it in both respects. 429 F. Supp., at 260; App. to Pet. for Cert. 95, 102, 105.

Because the District Court and the Court of Appeals committed no prejudicial errors of fact or law, the judgment appealed from must be affirmed.

So ordered.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I perceive no real difference in the legal principles stated in the dissenting opinions of MR. JUSTICE REHNQUIST and MR. JUSTICE POWELL on the one hand and the opinion of MR. JUSTICE STEWART concurring in the result in this case on the other; they differ only in their view of the District Court's role in applying these principles in the finding of facts.

Like MR. JUSTICE REHNQUIST, I have serious doubts as to how many of the post-1954 actions of the Columbus Board of Education can properly be characterized as segregative in intent and effect. On this record I might very well have concluded that few of them were. However, like MR. JUSTICE STEWART, I am prepared to defer to the trier of fact because I find it difficult to hold that the errors rise to the level of "clearly erroneous" under Rule 52. The District Court did find facts sufficient to justify the conclusion reached by MR. JUSTICE STEWART that the school "district was not being operated in a racially neutral manner" and that the Board's actions affected "a meaningful portion" of the school system. *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 208 (1973). For these reasons I join MR. JUSTICE STEWART's opinion.

In joining that opinion, I must note that I agree with much

that is said by JUSTICES REHNQUIST and POWELL in their dissenting opinions in this case and in *Dayton Board of Education* v. *Brinkman, post,* p. 526. I agree especially with that portion of MR. JUSTICE REHNQUIST's opinion that criticizes the Court's reliance on the finding that both Columbus and Dayton operated "dual school systems" at the time of *Brown* v. *Board of Education,* 347 U. S. 483 (1954), as a basis for holding that these school boards have labored under an unknown and unforeseeable affirmative duty to desegregate their schools for the past 25 years. Nothing in reason or our previous decisions provides foundation for this novel legal standard.

I also agree with many of the concerns expressed by MR. JUSTICE POWELL with regard to the use of massive transportation as a "remedy." It is becoming increasingly doubtful that massive public transportation really accomplishes the desirable objectives sought. Nonetheless our prior decisions have sanctioned its use when a constitutional violation of sufficient magnitude has been found. We cannot retry these sensitive and difficult issues in this Court; we can only set the general legal standards and, within the limits of appellate review, see that they are followed.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE joins, concurring in the result in No. 78–610 and dissenting in No. 78–627, *post,* p. 526.

My views in these cases differ in significant respects from those of the Court, leading me to concur only in the result in the *Columbus* case, and to dissent from the Court's judgment in the *Dayton* case.

It seems to me that the Court of Appeals in both of these cases ignored the crucial role of the federal district courts in school desegregation litigation[1]—a role repeatedly emphasized

[1] Federal Rule Civ. Proc. 52 (a) reflects the general deference that is to be paid to the findings of a district court. "Findings of fact shall not

by this Court throughout the course of school desegregation controversies, from *Brown* v. *Board of Education*, 349 U. S. 294 (*Brown II*),[2] to *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (*Dayton I*).[3] The development of the law concerning school segregation has not reduced the need for sound factfinding by the district courts, nor lessened the appropriateness of deference to their findings of fact. To the contrary, the elimination of the more conspicuous forms of governmentally ordained racial segregation over the last 25 years counsels undiminished deference to the factual adjudications of the federal trial judges in cases such as these, uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit.

Whether actions that produce racial separation are intentional within the meaning of *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189; *Washington* v. *Davis*, 426 U. S. 229; and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, is an issue that can present very difficult

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be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." See *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394–395.

[2] "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." *Brown II*, 349 U. S., at 299.

[3] "Indeed, the importance of the judicial administration aspects of the case are heightened by the presence of the substantive issues on which it turns. The proper observance of the division of functions between the federal trial courts and the federal appellate courts is important in every case. It is especially important in a case such as this where the District Court for the Southern District of Ohio was not simply asked to render judgment in accordance with the law of Ohio in favor of one private party against another; it was asked by the plaintiffs, students in the public school system of a large city, to restructure the administration of that system." *Dayton I*, 433 U. S., at 409–410.

and subtle factual questions. Similarly intricate may be factual inquiries into the breadth of any constitutional violation, and hence of any permissible remedy. See *Milliken* v. *Bradley*, 418 U. S. 717 (*Milliken I*); *Dayton I*, *supra*. Those tasks are difficult enough for a trial judge. The coldness and impersonality of a printed record, containing the only evidence available to an appellate court in any case, can hardly make the answers any clearer. I doubt neither the diligence nor the perseverance of the judges of the courts of appeals, or of my Brethren, but I suspect that it is impossible for a reviewing court factually to know a case from a 6,600-page printed record as well as the trial judge knew it. In assessing the facts in lawsuits like these, therefore, I think appellate courts should accept even more readily than in most cases the factual findings of the courts of first instance.

My second disagreement with the Court in these cases stems from my belief that the Court has attached far too much importance in each case to the question whether there existed a "dual school system" in 1954. As I understand the Court's opinions in these cases, if such an officially authorized segregated school system can be found to have existed in 1954, then any current racial separation in the schools will be presumed to have been caused by acts in violation of the Constitution. Even if, as the Court says, this presumption is rebuttable, the burden is on the school board to rebut it. And, when the factual issues are as elusive as these, who bears the burden of proof can easily determine who prevails in the litigation. *Speiser* v. *Randall*, 357 U. S. 513, 525–526.

I agree that a school district in violation of the Constitution in 1954 was under a duty to remedy that violation. So was a school district violating the Constitution in 1964, and so is one violating the Constitution today. But this duty does not justify a complete shift of the normal burden of proof.[4]

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[4] In *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, the Court did discuss the affirmative duty of a school board to desegregate

Presumptions are sometimes justified because in common experience some facts are likely to follow from others. See *Ulster County Court* v. *Allen*, 442 U. S. 140; *Sandstrom* v. *Montana*, 442 U. S. 510. A constitutional violation in 1954 might be presumed to make the existence of a constitutional violation 20 years later more likely than not in one of two ways. First, because the school board then had an invidious intent, the continuing existence of that collective state of mind might be presumed in the absence of proof to the contrary. Second, quite apart from the current intent of the school board, an unconstitutionally discriminatory school system in 1954 might be presumed still to have major effects on the contemporary system. Neither of these possibilities seems to me likely enough to support a valid presumption.

Much has changed in 25 years, in the Nation at large and in Dayton and Columbus in particular. Minds have changed with respect to racial relationships. Perhaps more importantly, generations have changed. The prejudices of the school boards of 1954 (and earlier) cannot realistically be assumed to haunt the school boards of today. Similarly, while two full generations of students have progressed from kindergarten through high school, school systems have changed. Dayton and Columbus are both examples of the dramatic growth and change in urban school districts.[5] It is unrealistic

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the school district, but limited its discussion to cases "where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education* . . . ." *Id.*, at 200. It is undisputed that Ohio has forbidden its school boards racially to segregate the public schools since at least 1888. See *Dayton I*, 433 U. S., at 410 n. 4; Ohio Rev. Code Ann. § 3313.48 (Supp. 1978); *Board of Education* v. *State*, 45 Ohio St. 555, 16 N. E. 373; *Clemons* v. *Board of Education*, 228 F. 2d 853, 858.

[5] The Columbus School District grew quickly in the years after 1954. In 1950–1951, the district had 46,352 students. In 1960–1961, over 83,000 students were enrolled. Attendance peaked in 1971–1972 at just over 110,000 students, before sinking to 95,000 at the time of trial. Between

to assume that the hand of 1954 plays any major part in shaping the current school systems in either city. For these reasons, I simply cannot accept the shift in the litigative burden of proof adopted by the Court.

Because of these basic disagreements with the Court's approach, these two cases look quite different to me from the way they look to the Court. In both cases, there is no doubt that many of the districts' children are in schools almost solely with members of their own race. These racially distinct areas make up substantial parts of both districts. The question remains, however, whether the plaintiffs showed that this racial separation was the result of intentional systemwide discrimination.

The *Dayton* case

After further hearings following the remand by this Court in the first *Dayton* case, the District Court dismissed this lawsuit. It found that the plaintiffs had not proved a discriminatory purpose behind many of the actions challenged. It found further that the plaintiffs had not proved that any significant segregative effect had resulted from those few practices that the school board had previously undertaken with an invalid intent. The Court of Appeals held these findings to be clearly erroneous. I cannot agree.

As to several claimed acts of post-1954 discrimination, the Court of Appeals seems simply to have differed with the trial court's factual assessments, without offering a reasoned explanation of how the trial court's finding fell short.[6] The

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1950 and 1970, an average of over 100 classrooms a year were added to the district.

Although the Dayton District grew less dramatically, the student population increased from 35,000 in 1950–1951, of whom approximately 6,600 were Negro, to 45,000 at the time of trial, of whom about 22,000 were Negro. Twenty-four new schools were opened in Dayton between 1950 and the time of trial.

[6] For example, the District Court concluded that faculty segregation in

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Court of Appeals may have been correct in its assessment of the facts, but that is not demonstrated by its opinion. I would accept the trial judge's findings of fact.

Furthermore, the Court of Appeals relied heavily on the proposition that the Dayton School District was a "dual system" in 1954, and today this Court places great stress on the same foundation. In several instances, the Court of Appeals overturned the District Court's findings of fact because of the trial court's failure to shift the burden of proof.[7] Because I think this shifting of the burden is wholly unjustified, it seems to me a serious mistake to upset the District Court's findings on any such basis. If one accepts the facts as found by the District Judge, there is almost no basis for finding any constitutional violations *after* 1954. Nor is there any substantial

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the Dayton district ceased by 1963. The Court of Appeals reversed, saying:

"In *Brinkman I*, *supra*, 503 F. 2d at 697–98, this court found that defendants 'effectively continued in practice the racial assignment of faculty through the 1970–71 school year.' This finding is supported by substantial evidence on the record. The finding of the district court to the contrary is clearly erroneous." (Footnotes omitted.) *Brinkman* v. *Gilligan*, 583 F. 2d 243, 253 (CA6).

[7] Thus, in considering certain optional attendance zones that the District Court found had not been instituted with a discriminatory intent, the Court of Appeals wrote:

"In reaching these clearly erroneous findings of fact, the district court once again failed to recognize the optional zones as a perpetuation, rather than an elimination, of the existing dual system; failed to afford plaintiffs the burden-shifting benefits of their prima facie case; and failed to evaluate the evidence in light of tests for segregative intent enunciated by the Supreme Court, this court and other circuits in decisions cited in this opinion." *Id.*, at 255.

The Court of Appeals opinion relied upon the same theory in overturning the factual conclusions of the District Court that school construction and site selection had not been undertaken with a discriminatory purpose in Dayton. Thus, it is impossible to separate the conclusions of law made by the Court of Appeals from its rulings that the District Court made clearly erroneous findings of fact.

evidence of the continuing impact of pre-1954 discrimination. Only if the defendant school board is saddled with the burdens of proving that it acted out of proper motives after 1954 *and* that factors other than pre-1954 policies led to racial separation in the district's schools, could these plaintiffs possibly prevail.

For the reasons I have expressed, I dissent from the opinion and judgment of the Court.

The *Columbus* case

In contrast, the Court of Appeals did not upset the District Court's findings of fact in this case. In a long and careful opinion, the District Judge discussed numerous examples of overt racial discrimination continuing into the 1970's.[8] Just

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[8] The two clearest cases of discrimination involved attendance zones. The near-Bexley optional zone operated from the 1959–1960 school year through the 1974–1975 school year. This zone encompassed a small area of Columbus between Alum Creek and the town of Bexley. The area west of the creek was predominately Negro; the area covered by the option was predominately white. Students living in that zone were given the option of being bused entirely through the town of Bexley to "white" Columbus schools on its eastern border. The District Court concluded:

"Nothing presented by the Columbus defendants at trial, at closing arguments, or in their briefs convinces the Court that the Near-Bexley Option was created or maintained for racially neutral reasons. The Court finds that the option was not created and maintained because of overcrowding or geographical barriers.

. . . . . .

". . . Quite frankly, the Near-Bexley Option appears to this Court to be a classic example of a segregative device designed to permit white students to escape attendance at predominately black schools." 429 F. Supp. 229, 245 (SD Ohio).

The Moler discontiguous zone affected two elementary schools in the southeastern portion of the school district. A majority of the students in the Alum Crest Elementary School were, at all relevant times, Negro. Through 1969, no more than 8.7% of the students at the other school, Moler Elementary, were Negro. The District Court found:

"Between September, 1966 and June, 1968, about 70 students, most of them white, were bused daily past Alum Crest Elementary from the dis-

as I would defer to the findings of fact made by the District Court in the *Dayton* case, I would accept the trial court's findings in this case.

The Court of Appeals did rely in part on its finding that the Columbus Board operated a dual school system in 1954, as does this Court. But evidence of recent discriminatory intent, so lacking in the *Dayton* case, was relatively strong in this case. The particular illustrations recounted by the District Court may not have affected a large portion of the school district, but they demonstrated that the district was not being operated in a racially neutral manner. The District Court found that the Columbus Board had intentionally discriminated against Negro students in some schools, and that there was substantial racial separation throughout the district. The question in my judgment is whether the District Court's conclusion that there had been a systemwide constitutional violation can be upheld on the basis of those findings, without reference to an affirmative duty stemming from the situation in 1954.

I think the Court's decision in *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, provides the answer:

> "[W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case

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contiguous attendance area to Moler Elementary. The then-principal of Alum Crest watched the bus drive past the Alum Crest building on its way to and from Moler. At the time, the Columbus Board of Education was leasing 11 classrooms at Alum Crest to Franklin County. There was enough classroom space at Alum Crest to accommodate the students who were transported to Moler. When the principal inquired of a Columbus school administrator why this situation existed, he was given no reasonable explanation.

"The Court can discern no other explanation than a racial one for the existence of the Moler discontiguous attendance area for the period 1963 through 1969." *Id.*, at 247.

> of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions." *Id.*, at 208.

The plaintiffs in the *Columbus* case, unlike those in the *Dayton* case, proved what the Court in *Keyes* defined as a prima facie case.[9] The District Court and the Court of Appeals correctly found that the school board did not rebut this presumption. It is on this basis that I agree with the District Court and the Court of Appeals in concluding that the Columbus School District was operated in violation of the Constitution.

The petitioners in the *Columbus* case also challenge the remedy imposed by the District Court. Just two Terms ago we set out the test for determining the appropriate scope of a remedy in a case such as this:

> "If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the . . . school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy." *Dayton I*, 433 U. S., at 420.

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[9] The Denver School District at the time of the trial in *Keyes* had 96,000 students, almost exactly the number of students in the Columbus system at the time of this trial. The Park Hill region of Denver had been the scene of the intentional discrimination that the Court believed justified a presumption of systemwide violation. That region contained six elementary schools and one junior high school, educating a small portion of the school district's students, but a large number of the district's Negro students.

In the context in which the *Columbus* case has reached us, I cannot say that the remedy imposed by the District Court was impermissible under this test. For the reasons discussed above, the District Court's conclusion that there was a systemwide constitutional violation was soundly based. And because the scope of the remedy is tied to the scope of the violation, a remedy encompassing the entire school district was presumptively appropriate. In litigating the question of remedy, however, I think the defendants in a case such as this should always be permitted to show that certain schools or areas were not affected by the constitutional violation.

The District Court in this case did allow the defendants to show just that. The school board proposed several remedies, but it put forward only one plan that was limited by the allegedly limited effects of the violation. That plan would have remedied racial imbalance only in the schools mentioned in the District Court's opinion. Another remedy proposed by the school board would have resulted in a rough racial balance in all but 22 "all-white" schools. But the board did not assert that those schools had been unaffected by the violations. Instead, it justified that plan on the ground that it would bring the predominately Negro schools into balance with no need to involve the 22 all-white schools on the periphery of the district. The District Court rejected this plan, finding that it would not offer effective desegregation since it would leave those 22 schools available for "white flight." The plan ultimately adopted by the District Court used the Negro school population of Columbus as a benchmark, and decreed that all the public schools should be 32% minority, plus or minus 15%.

Although, as the Court stressed in *Green* v. *County School Board*, 391 U. S. 430, a remedy is to be judged by its effectiveness, effectiveness *alone* is not a reason for extending a remedy to all schools in a district. An easily visible correlation between school segregation and residential segregation cannot by

itself justify the blanket extension of a remedy throughout a district. As *Dayton I* made clear, unless a school was affected by the violations, it should not be included in the remedy. I suspect the defendants in *Columbus* might have been able to show that at least some schools in the district were not affected by the proved violations. Schools in the far eastern or northern portions of the district were so far removed from the center of Negro population that the unconstitutional actions of the board may not have affected them at all. But the defendants did not carry the burden necessary to exclude those schools.

The remedy adopted by the District Court used numerical guidelines, but it was not for that reason invalid. As this Court said in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1:

> "Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court." *Id.,* at 25.

On this record, therefore, I cannot say that the remedy was improper.

For these reasons, I concur in the result in *Columbus Board of Education* v. *Penick,* and dissent in *Dayton Board of Education* v. *Brinkman.*

MR. JUSTICE POWELL, dissenting.*

I join the dissenting opinions of MR. JUSTICE REHNQUIST and write separately to emphasize several points. The Court's opinions in these two cases are profoundly disturbing. They appear to endorse a wholly new constitutional concept applicable to school cases. The opinions also seem remark-

*[This opinion applies also to No. 78-627, *Dayton Board of Education et al.* v. *Brinkman et al., post,* p. 526.]

ably insensitive to the now widely accepted view that a quarter of a century after *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (*Brown I*), the federal judiciary should be limiting rather than expanding the extent to which courts are operating the public school systems of our country. In expressing these views, I recognize, of course, that my Brothers who have joined the Court's opinions are motivated by purposes and ideals that few would question. My dissent is based on a conviction that the Court's opinions condone the creation of bad constitutional law and will be even worse for public education—an element of American life that is essential, especially for minority children.

I

MR. JUSTICE REHNQUIST's dissents demonstrate that the Court's decisions mark a break with both precedent and principle. The Court indulges the courts below in their stringing together of a chain of "presumptions," not one of which is close enough to reality to be reasonable. See *ante*, at 472 (opinion of STEWART, J.). This chain leads inexorably to the remarkable conclusion that the absence of integration found to exist in a high percentage of the 241 schools in Columbus and Dayton was caused entirely by intentional violations of the Fourteenth Amendment by the school boards of these two cities. Although this conclusion is tainted on its face, is not supported by evidence in either case, and as a general matter seems incredible, the courts below accepted it as the necessary premise for requiring as a matter of *constitutional law* a systemwide remedy prescribing racial balance in each and every school.

There are unintegrated schools in every major urban area in the country that contains a substantial minority population. This condition results primarily from familiar segregated housing patterns, which—in turn—are caused by social, economic, and demographic forces for which no school board is responsible. These causes of the greater part of the school

segregation problem are not newly discovered. Nearly a decade ago, Professor Bickel wrote:

> "In most of the larger urban areas, demographic conditions are such that no policy that a court can order, and a school board, a city or even a state has the capability to put into effect, will in fact result in the foreseeable future in racially balanced public schools. Only a reordering of the environment involving economic and social policy on the broadest conceivable front might have an appreciable impact." A. Bickel, The Supreme Court and the Idea of Progress 132, and n. 47 (1970).[1]

Federal courts, including this Court today, continue to ignore these indisputable facts. Relying upon fictions and presumptions in school cases that are irreconcilable with principles of equal protection law applied in all other cases, see, *e. g.*, *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256 (1979); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977); *Washington* v. *Davis*, 426 U. S. 229 (1976), federal courts prescribe systemwide remedies without relation to the causes of the segregation found to exist, and implement their decrees by requiring extensive transportation of children of all school ages.

The type of state-enforced segregation that *Brown I* properly condemned no longer exists in this country. This is not to say that school boards—particularly in the great cities of the North, Midwest, and West—are taking all reasonable measures to provide integrated educational opportunities. As I indicated in my separate opinion in *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 223–236 (1973), *de facto* segregation has existed on a large scale in many of these cities,

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[1] See also Farley, Residential Segregation and Its Implications for School Integration, 39 Law & Contemp. Prob., No. 1, p. 164 (1975); K. Taeuber & A. Taeuber, Negroes in Cities (1965). The Court of Appeals below treated the residential segregation in Dayton and Columbus as irrelevant. See *post*, at 522, and n. 24 (REHNQUIST, J., dissenting).

and often it is indistinguishable in effect from the type of *de jure* segregation outlawed by *Brown*. Where there is proof of intentional segregative action or inaction, the federal courts must act, but their remedies should not exceed the scope of the constitutional violation. *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977); *Austin Independent School Dist.* v. *United States*, 429 U. S. 990, 991 (1976) (POWELL, J., concurring); *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976); *Milliken* v. *Bradley*, 418 U. S. 717 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971). Systemwide remedies such as were ordered by the courts below, and today are approved by this Court, lack any principled basis when the absence of integration in all schools cannot reasonably be attributed to discriminatory conduct.[2]

MR. JUSTICE REHNQUIST has dealt devastatingly with the

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[2] As I suggested in my separate opinion in *Keyes*, it is essential to identify the constitutional right that is asserted in school desegregation cases. The Court's decisions hardly have been lucid on this point. In *Brown* v. *Board of Education*, 349 U. S. 294 (1955) (*Brown II*), the Court identified the "fundamental principle" enunciated in *Brown I*, as being the unconstitutionality of "racial discrimination in public education." 349 U. S., at 298. In *Keyes*, I undertook to define the right, derived from the Equal Protection Clause, as one to attend an "integrated school system," a system in which school authorities take into consideration the enhancement of integrated school opportunities in addition to the goal of quality education in making and implementing their customary decisions. 413 U. S., at 226. I also noted that an integrated system does not mean that "*every school* must in fact be an integrated unit," *id.*, at 227, and emphasized that the Equal Protection Clause "does not require that school authorities undertake widespread student transportation solely for the sake of maximizing integration." *Id.*, at 242. When challenged, the school authorities must show that in fact they are operating an integrated system in the foregoing sense. This is quite different from the burden imposed on the school authorities by the Court of Appeals and the District Court in No. 78–610, of proving, by a preponderance of the evidence, that they have met an affirmative duty in existence since 1954 to eliminate every racially identifiable school "root and branch."

way in which the Court of Appeals endowed prior precedents with new and wondrous meanings. I can add little to what he has said. I therefore move to more general but, in my view, important considerations that the Court simply ignores.

II

Holding the school boards of these two cities responsible for *all* of the segregation in the Dayton and Columbus systems and prescribing fixed racial ratios in every school as the constitutionally required remedy necessarily implies a belief that the same school boards—under court supervision—will be capable of bringing about and maintaining the desired racial balance in each of these schools. The experience in city after city demonstrates that this is an illusion. The process of resegregation, stimulated by resentment against judicial coercion and concern as to the effect of court supervision of education, will follow today's decisions as surely as it has in other cities subjected to similar sweeping decrees.

The orders affirmed today typify intrusions on local and professional authorities that affect adversely the quality of education. They require an extensive reorganization of both school systems, including the reassignment of almost half of the 96,000 students in the Columbus system and the busing of some 15,000 students in Dayton. They also require reassignments of teachers and other staff personnel, reorganization of grade structures, and the closing of certain schools. The orders substantially dismantle and displace neighborhood schools in the face of compelling economic and educational reasons for preserving them. This wholesale substitution of judicial legislation for the judgments of elected officials and professional educators derogates the entire process of public education.[3] Moreover, it constitutes a serious interference

[3] Defending lawsuits that remain active for years and complying with elaborate court decrees also divert the time, attention, and resources of school authorities from education.

with the private decisions of parents as to how their children will be educated. These harmful consequences are the inevitable byproducts of a judicial approach that ignores other relevant factors in favor of an exclusive focus on racial balance in every school.

These harmful consequences, moreover, in all likelihood will provoke responses that will defeat the integrative purpose of the courts' orders. Parents, unlike school officials, are not bound by these decrees and may frustrate them through the simple expedient of withdrawing their children from a public school system in which they have lost confidence. In spite of the substantial costs often involved in relocation of the family or in resort to private education,[4] experience demonstrates that many parents view these alternatives as preferable to submitting their children to court-run school systems. In the words of a leading authority:

> "An implication that should have been seen all along but can no longer be ignored is that a child's enrollment in a given public school is not determined by a governmental decision alone. It is a joint result of a governmental decision (the making of school assignments) and parental decisions, whether to remain in the same residential location, whether to send their child to a private school, or which school district to move into when moving into a metropolitan area. The fact that the child's enrollment is a result of two decisions operating jointly means that government policies must, to be effective, anticipate parental decisions and obtain the parents' active cooperation in implementing school policies." Cole-

[4] A third alternative is available to parents moving for the first time into a metropolitan area where a school district is operating under a "system-wide remedy" decree. To avoid the probability of their children being bused away from neighborhood schools, and in view of the widely held belief that the schools under a court decree are likely to be inferior, these parents may seek residences beyond the urban school district.

man, New Incentives for Desegregation, 7 Human Rights, No. 3, pp. 10, 13 (1978).

At least where inner-city populations comprise a large proportion of racial minorities and surrounding suburbs remain white, conditions that exist in most large American cities, the demonstrated effect of compulsory integration is a substantial exodus of whites from the system. See J. Coleman, S. Kelly, & J. Moore, Trends in School Segregation, 1968–1973, pp. 66, 76–77 (1975). It would be unfair and misleading to attribute this phenomenon to a racist response to integration *per se*. It is at least as likely that the exodus is in substantial part a natural reaction to the displacement of professional and local control that occurs when courts go into the business of restructuring and operating school systems.

Nor will this resegregation be the only negative effect of court-coerced integration on minority children. Public schools depend on community support for their effectiveness. When substantial elements of the community are driven to abandon these schools, their quality tends to decline, sometimes markedly. Members of minority groups, who have relied especially on education as a means of advancing themselves, also are likely to react to this decline in quality by removing their children from public schools.[5] As a result,

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[5] Academic debate has intensified as to the degree of educational benefit realized by children due to integration. See R. Crain & R. Mahard, The Influence of High School Racial Composition on Black College Attendance and Test Performance (1978); Coleman, New Incentives for Desegregation, 7 Human Rights, No. 3, p. 10 (1978); Weinberg, The Relationship Between School Desegregation and Academic Achievement: A Review of the Research, 39 Law & Contemp. Prob., No. 2, p. 241 (1975). Much of the dispute seems beside the point. It is essential that the diverse peoples of our country learn to live in harmony and mutual respect. This end is furthered when young people attend schools with diverse student bodies. But the benefits that may be achieved through this experience often will be compromised where the methods employed to promote integration include coercive measures such as forced transportation to achieve some

public school enrollment increasingly will become limited to children from families that either lack the resources to choose alternatives or are indifferent to the quality of education. The net effect is an overall deterioration in public education, the one national resource that traditionally has made this country a land of opportunity for diverse ethnic and racial groups. See *Keyes*, 413 U. S., at 250 (opinion of POWELL, J.).

III

If public education is not to suffer further, we must "return to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert." *Id.*, at 253. The ultimate goal is to have quality school systems in which racial discrimination is neither practiced nor tolerated. It has been thought that ethnic and racial diversity in the classroom is a desirable component of sound education in our country of diverse populations, a view to which I subscribe. The question that courts in their single-minded pursuit of racial balance seem to ignore is how best to move toward this goal.

For a decade or more after *Brown I*, the courts properly focused on dismantling segregated school systems as a means of eliminating state-imposed discrimination and furthering wholesome diversity in the schools.[6] Experience in recent

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theoretically desirable racial balance. Cf. N. St. John, School Desegregation Outcomes for Children (1975).

[6] During this period the issues confronted by the courts by and large involved combating the devices by which States deliberately perpetuated dual school systems and dismantling segregated systems in small, rural areas. *E. g.*, *Green* v. *County School Board*, 391 U. S. 430 (1968); *Griffin* v. *School Board*, 377 U. S. 218 (1964); *Goss* v. *Board of Education*, 373 U. S. 683 (1963); *Cooper* v. *Aaron*, 358 U. S. 1 (1958). See Wilkinson, The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis, 64 Va. L. Rev. 485 (1978). This Court did not begin to face the difficult administrative and social problems associated with *de facto* segregation in large urban school systems until *Swann* v.

years, however, has cast serious doubt upon the efficacy of far-reaching judicial remedies directed not against specific constitutional violations, but rather imposed on an entire school system on the fictional assumption that the existence of identifiable black or white schools is caused entirely by intentional segregative conduct, and is evidence of system-wide discrimination. In my view, some federal courts—now led by this Court—are pursuing a path away from rather than toward the desired goal. While these courts conscientiously view their judgments as mandated by the Constitution (a view that would have astonished constitutional scholars throughout most of our history), the fact is that restructuring and overseeing the operation of major public school systems—as ordered in these cases—fairly can be viewed as social engineering that hardly is appropriate for the federal judiciary.

The time has come for a thoughtful re-examination of the proper limits of the role of courts in confronting the intractable problems of public education in our complex society. Proved discrimination by state or local authorities should never be tolerated, and it is a first responsibility of the judiciary to put an end to it where it has been proved. But many courts have continued also to impose wide-ranging decrees, and to retain ongoing supervision over school systems. Local and state legislative and administrative authorities have been supplanted or relegated to initiative-stifling roles as minions of the courts. Indeed, there is reason to believe that some legislative bodies have welcomed judicial activism with respect to a subject so inherently difficult and so politically sensitive that the prospect of others confronting it seems inviting. Federal courts no longer should encourage this deference by the appropriate authorities—no matter how willing they may

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Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971). It is especially unfortunate that the Court today refuses to acknowledge these problems and chooses instead to sanction methods that, although often appropriate and salutary in the earlier context, are disruptive and counterproductive in school systems like those in Columbus and Dayton.

be to defer. Courts are the branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education.

School boards need not wait, and many have not waited, for innovative legislative guidance. The opinion of the Court in *Swann*, though often cited (as in this case) for views I think were never intended, identified some constructive actions always open to school authorities:

> "An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority [or less in the majority] is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be made available in the school to which he desires to move." 402 U. S., at 26–27.

See also *Keyes*, 413 U. S., at 240–241 (opinion of POWELL, J.). Incentives can be employed to encourage these transfers, such as creation of magnet schools providing special educational benefits and state subsidization of those schools that expand their minority enrollments. See, *e. g.*, Willie, Racial Balance or Quality Education?, in School Desegregation, Shadow and Substance 7 (Levinsohn & Wright eds. 1976). These and like plans, if adopted voluntarily by States, also could help counter the effects of racial imbalances between school districts that are beyond the reach of judicial correction. See *Milliken* v. *Bradley*, 418 U. S. 717 (1974); cf. Coleman, 7 Human Rights, at 48–49.[7]

[7] Wisconsin has implemented a system of subsidized, voluntary, intra- and inter-district majority-to-minority transfers. 1975 Wis. Laws, ch. 220,

After all, and in spite of what many view as excessive government regulation, we are a free society—perhaps the most free of any in the world. Our people instinctively resent coercion, and perhaps most of all when it affects their children and the opportunities that only education affords them. It is now reasonably clear that the goal of diversity that we call integration, if it is to be lasting and conducive to quality education, must have the support of parents who so frequently have the option to choose where their children will attend school. Courts, of course, should confront discrimination wherever it is found to exist. But they should recognize limitations on judicial action inherent in our system and also the limits of effective judicial power. The primary and continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

The school desegregation remedy imposed on the Columbus school system by this Court's affirmance of the Court of Appeals is as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system. Pursuant to the District Court's order, 42,000 of the system's 96,000 students are reassigned to new schools. There are like reassignment of teachers, staff, and administrators, reorganization of the grade structure of virtually every

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codified at Wis. Stat. § 121.85 (1975). It is too early to determine whether this experiment will attain its objective of encouraging substantial integration. But it is the sort of effort that should be considered by state and local officials and elected bodies. The contrast between the underlying philosophy of the Wisconsin plan and the massive coercion undertaken by the courts below is striking. See Meadows, Open Enrollment and Fiscal Incentives, in School Desegregation, Shadow and Substance 143 (Levinsohn & Wright eds. 1976).

elementary school in the system, the closing of 33 schools, and the additional transportation of 37,000 students.

It is difficult to conceive of a more serious supplantation because, as this Court recognized in *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954) (*Brown I*), "education is perhaps the most important function of state and local governments"; indeed, it is "a vital national tradition." *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 410 (1977) (*Dayton I*); see *Milliken* v. *Bradley*, 418 U. S. 717, 741–742 (1974); *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 469 (1972). That "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process," *Milliken, supra*, at 741–742, does not, of course, place the school system beyond the authority of federal courts as guardians of federal constitutional rights. But the practical and historical importance of the tradition does require that the existence of violations of constitutional rights be carefully and clearly defined before a federal court invades the traditional ambit of local control, and that the subsequent displacement of local authority be limited to that necessary to correct the identified violations. "It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Dayton I, supra*, at 410.

I think the District Court and Court of Appeals in this case did not heed this admonition. One can search their opinions in vain for any concrete notion of what a "systemwide violation" consists of or how a trial judge is to go about determining whether such a violation exists or has existed. What logic is evident emasculates the key determinants set down in *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189 (1973), for proving the existence and scope of a violation warranting federal-court intervention: discriminatory purpose and a causal relationship between acts motivated by such a

purpose and a current condition of segregation in the school system. The lower courts' methodology would all but eliminate the distinction between *de facto* and *de jure* segregation and render all school systems captives of a remote and ambiguous past.

Today the Court affirms the Court of Appeals for the Sixth Circuit in this case and *Dayton Board of Education* v. *Brinkman* (*Dayton II*), *post*, p. 526, in opinions so Delphic that lower courts will be hard pressed to fathom their implications for school desegregation litigation. I can only offer two suggestions. The first is that the Court, possibly chastened by the complexity and emotion that accompanies school desegregation cases, wishes to relegate the determination of a violation of the Equal Protection Clause of the Fourteenth Amendment in any plan of pupil assignment, and the formulation of a remedy for its violation, to the judgment of a single district judge. That judgment should be subject to review under the "clearly erroneous" standard by the appropriate court of appeals, in much the same way that actions for an accounting between private partners in a retail shoe business or claimants in an equitable receivership of a failing commercial enterprise are handled. "Discriminatory purpose" and "systemwide violation" are to be treated as talismanic phrases which, once invoked, warrant only the most superficial scrutiny by appellate courts.

Such an approach is, however, obviously inconsistent with the *Dayton I* admonition and disparages both this Court's oft-expressed concern for the important role of local autonomy in educational matters and the significance of the constitutional rights involved. It also holds out the disturbing prospect of very different remedies being imposed on similar school systems because of the predilections of individual judges and their good-faith but incongruent efforts to make sense of this Court's confused pronouncements today.[1] Concepts such as

[1] See *Dayton Board of Education* v. *Brinkman* (*Dayton II*), *post*, p. 542 (REHNQUIST, J., dissenting).

"discriminatory purpose" and "systemwide violation" present highly mixed questions of law and fact. If district court discretion is not channelized by a clearly articulated methodology, the entire federal-court system will experience the disaffection which accompanies violation of Cicero's maxim not to "lay down one rule in Athens and another rule in Rome."

Yet, the only alternative reading of today's opinions, *i. e.*, a literal reading, is even more disquieting. Such a reading would require embracing a novel analytical approach to school segregation in systems without a history of statutorily mandated separation of the races—an approach that would have dramatic consequences for urban school systems in this country. Perhaps the adjective "analytical" is out of place, since the Court's opinions furnish only the most superficial methodology, a framework which if it were to be adopted ought to be examined in a far more thorough and critical manner than is done by the Court's "lick and a promise" opinions today. Given the similar approaches employed by the Court in this case and *Dayton II*, this case suffices for stating what I think are the glaring deficiencies both in the Court's new framework and in its decision to subject the Columbus school system to the District Court's sweeping racial balance remedy.

I

The Court suggests a radical new approach to desegregation cases in systems without a history of statutorily mandated separation of the races: if a district court concludes—employing what in honesty must be characterized as an irrebuttable presumption—that there was a "dual" school system at the time of *Brown I*, 347 U. S. 483 (1954), it must find post-1954 constitutional violations in a school board's failure to take every affirmative step to integrate the system. Put differently, *racial imbalance* at the time the complaint is filed is sufficient to support a systemwide, racial balance, school busing

remedy if the district court can find *some* evidence of discriminatory purpose prior to 1954, without any inquiry into the causal relationship between those pre-1954 violations and current segregation in the school system.

This logic permeates the findings of the District Court and Court of Appeals, and the latter put it most bluntly.

> "[T]he District Judge on review of pre-1954 history found that the Columbus schools were de jure segregated in 1954 and, hence, the Board had a continuing constitutional duty to desegregate the Columbus schools. The pupil assignment figures for 1975–76 demonstrate the District Judge's conclusion that this burden has not been carried. On this basis alone (if there were no other proofs), we believe we would be required to affirm the District Judge's finding of present unconstitutional segregation." 583 F. 2d 787, 800 (1978).

In *Brinkman* v. *Gilligan,* 583 F. 2d 243, 256 (CA6 1978), also affirmed today, this post-1954 "affirmative duty" is characterized as a duty "to diffuse black and white students" throughout the system.

The Court in this case apparently endorses that view. For the Court finds that "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment," *ante,* at 459, and the mere fact that at the time of suit "most blacks were still going to black schools and most whites to white schools" establishes current effect. *Ante,* at 461.

In order to fully comprehend the dramatic reorientation the Court's opinion thus implies, and its lack of any principled basis, a brief historical review is necessary. In 1954, this Court announced *Brown I* and struck down on equal protection grounds laws requiring or permitting school assignment of children on the basis of race. See also *Bolling* v. *Sharpe,* 347 U. S. 497 (1954). The question of remedy was reserved for a new round of briefing, and the following Term this Court

remanded to the District Courts in the five consolidated cases "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955) (*Brown II*).

The majority concedes that this case does not involve racial assignment of students mandated by state law; Ohio abandoned any "statutory requirement or authorization to operate segregated schools" by 1888. *Ante*, at 455. Yet, it was precisely this type of segregation—segregation expressly mandated or permitted by state statute or constitution—that was addressed by *Brown I*, and the mandate of the *Brown* cases was that "[a]ll provisions of federal, state, or local law requiring or permitting such discrimination must yield" to "the fundamental principle that racial discrimination in public education is unconstitutional." 349 U. S., at 298. The message of *Brown II* was simple and resonant because the violation was simple and pervasive.

There were, however, some issues upon which the *Brown II* Court was vague. It did not define what it meant by "effectuat[ing] a transition to a racially nondiscriminatory school system," *id.*, at 301, and therefore the next 17 years focused on the question of the appropriate remedy where racial separation had been maintained by operation of state law.

The earliest post-*Brown* school cases in this Court only intimated that "a transition to a racially nondiscriminatory school system" required adoption of a policy of nondiscriminatory admission.[2] It was not until the 1967 Term that this

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[2] *Cooper* v. *Aaron*, 358 U. S. 1 (1958); *Goss* v. *Board of Education*, 373 U. S. 683 (1963); *Griffin* v. *School Board*, 377 U. S. 218 (1964).

In discussing the *Brown II* mandate, this Court in *Cooper* v. *Aaron*, *supra*, at 7, observed:

"Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular

Court indicated that school systems with a history of statutorily or constitutionally mandated separation of the races would have to do more than simply permit black students to attend white schools and vice versa. In that Term, the Court had before it "freedom-of-choice" plans put forward as desegregation remedies. The factual context of the lead case, *Green* v. *County School Board*, 391 U. S. 430 (1968), is a far cry from the complicated urban metropolitan system we confront today. The New Kent County school system consisted of two schools—one black and one white—with a total enrollment of 1,300 pupils. At the time of suit a black student had

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schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children."

A similar limited expectation pervades *Goss* v. *Board of Education*, *supra*, where this Court invalidated court-ordered desegregation plans which permitted transfers on the basis of race. Specifically, the desegregation plan called for the redrawing of school districts without reference to race, but explicitly authorized transfers by students of one race from a school where their race was a minority to a school where their race was a majority. There was no provision for majority-to-minority school transfers. This Court objected to the explicit racial character of the transfer program.

"Our task then is to decide whether these transfer provisions are . . . unconstitutional. In doing so, we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or transfer to another." 373 U. S., at 687.

Griffin v. *School Board*, *supra*, involved a situation where a school system literally closed down its schools rather than desegregate. The decree endorsed by this Court, in the face of massive resistance, was simply an order to the school board requiring it to admit students without regard to race to a white high school and to make plans for admissions to elementary schools without regard to race.

never attended the white school or a white student the black school.

This Court found that the "freedom-of-choice" plan approved by the District Court for the desegregation of the New Kent County schools was inadequate. Noting that the "pattern of separate 'white' and 'Negro' schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed," the Court observed that *Brown II* charged "[s]chool boards such as the respondent then operating state-compelled dual systems . . . with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U. S., at 435, 437–438. In the three years following court approval of the freedom-of-choice plan in New Kent County, not a single white child had chosen to attend the historically black school, which continued to serve 85% of the county's black schoolchildren. The *Green* Court concluded that a freedom-of-choice plan, in a school system such as this and in the absence of other efforts at desegregation, was not sufficient to provide the remedy mandated by *Brown II*. The Court suggested zoning, *i. e.*, some variation of a neighborhood school policy, as a possible alternative remedy.[3]

[3] Two other cases were handed down on the same day as *Green*. *Raney* v. *Board of Education*, 391 U. S. 443 (1968), involved an almost identical factual situation with a similar experience under a freedom-of-choice plan. For the same reasons that such a plan was inadequate for New Kent County, it was found inadequate for the Gould School District involved in the *Raney* litigation. The other case handed down with *Green*, *Monroe* v. *Board of Comm'rs*, 391 U. S. 450 (1968), concerned the city of Jackson, Tenn. At issue in that case was a "free-transfer" rather than "freedom-of-choice" plan. The "free-transfer" provisions were part of a court-ordered plan that essentially instituted a neighborhood school policy for the three junior high schools in the system. Any child could transfer to another school if space was available, *i. e.*, if there were no neighborhood-zone residents to fill the spaces. This Court did not object to the

That brings the history of school desegregation litigation in this Court to THE CHIEF JUSTICE's opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), upon which the majority and respondents heavily rely.[4] *Swann* also addressed school systems with a history of statutorily or constitutionally mandated separation of the races; "[t]hat was what *Brown* v. *Board of Education* was all about." *Id.*, at 6. *Swann* was an attempt to define "in more precise terms" the appropriate scope of the *remedy* in cases of that nature. *Ibid.* It simply did not attempt to articulate the manner by which courts were to determine the existence of a *violation* in school systems without a history of segregation imposed by statute or the state constitution.[5] Certainly school systems with such a history were charged by *Brown II* to "effectuate a transition to a racially nondiscriminatory school system." But *Swann* did not speak of the failure to conform to this duty as a "continuing violation." The specific references to an affirmative duty in *Swann* were to the

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neighborhood school policy as part of a remedy, even though some neighborhoods were racially identifiable, but it found that the effect of the free-transfer policy was to maintain the racial characters of the three junior high schools. One remained all black and another 99% white.

[4] There were two school desegregation cases heard in this Court in the years between *Swann* and *Green*. *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19 (1969), reiterated that the era of "all deliberate speed" had ended. *United States* v. *Montgomery County Board of Education*, 395 U. S. 225 (1969), involved an order requiring the reassignment of some faculty and staff of the Montgomery County school system in line with numerical targets set by the District Court.

[5] Nevertheless, the Court of Appeals refers to *Swann* as an opinion which "dealt more thoroughly than any other opinion of the Court with the method of proof of constitutional violations," 583 F. 2d 787, 793 (CA6 1978), and relies on it throughout its opinion for standards of proof in determining the existence of a violation. *Swann* was in fact an attempt to articulate the "equitable remedial discretion of the District Court" which admits more latitude than the standards for determining a violation. 402 U. S., at 25; see *id.*, at 15–16. There is no "discretion" in the latter context.

duty of a school board found to have overseen a school system with state-imposed segregation to put forward a plan to remedy that situation. It was in this context that the Court observed that upon "default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." 402 U. S., at 16.[6]

This understanding of the "affirmative duty" was acknowledged in the first case confronting a school system without a history of state-mandated racial assignment, *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189 (1973). There the Court observed:

> "[W]e have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (*Brown I*), the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system,' *Brown* v. *Board of Education*, 349 U. S.

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[6] Later in its opinion, the *Swann* Court refers to the District Court's finding, "approved by the Court of Appeals, that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the board to submit plans." *Id.*, at 24.

Four other cases came down the same day as *Swann*. One was dismissed for lack of jurisdiction, *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 47 (1971); one upheld a declaration that a North Carolina antibusing law was unconstitutional, *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43 (1971); and another remanded a remedy order for reconsideration in light of criteria laid down in *Swann*, *Davis* v. *Board of School Comm'rs of Mobile County*, 402 U. S. 33 (1971). The final case, *McDaniel* v. *Barresi*, 402 U. S. 39 (1971), invalidated a state-court order barring on federal grounds a formerly statutory dual system's voluntary transition to a modified neighborhood school policy.

294, 301 (1955) (*Brown II*), see also *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968), that is, to eliminate from the public schools within their school system 'all vestiges of state-imposed segregation.' *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971).

"This is not a case, however, where a statutory dual system has ever existed." *Id.*, at 200–201 (footnote omitted).

It was at this juncture that the Court articulated the proposition that has become associated with *Keyes*.

"Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system." *Id.*, at 201.

The notion of an "affirmative duty" as acknowledged in *Keyes* is a remedial concept defining the obligation on the school board to come forward with an effective desegregation plan *after* a finding of a dual system. This could not be clearer in *Keyes* itself.

"[P]roof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' *Brown II, supra,* at 301." *Id.*, at 203.[7]

[7] The point is reiterated later in the *Keyes* opinion.

"If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system 'root and branch.'" 413 U. S., at 213.

Indeed, *Keyes* did not discuss the complexion of the Denver school system in 1954 or in any other way intimate the analysis adopted by the Court today.[8] Rather, it emphasized that the relevance of past actions was determined by their causal relationship to current racially imbalanced conditions.

Even so brief a history of our school desegregation jurisprudence sheds light on more than one point. As a matter of history, case law, or logic, there is nothing to support the novel proposition that the primary inquiry in school desegregation cases involving systems without a history of statutorily mandated racial assignment is what happened in those systems before 1954. As a matter of history, 1954 makes no more sense as a benchmark—indeed it makes *less* sense—than 1968, 1971, or 1973. Perhaps the latter year has the most to commend it, if one insists on a benchmark, because in *Keyes* this Court first confronted the problem of school segregation in the context of systems without a history of statutorily mandated separation of the races.

As a matter of logic, the majority's decision to turn the year 1954 into a constitutional Rubicon also fails. The analytical underpinnings of the concept of discriminatory purpose have received their still incomplete articulation in the 1970's. It is sophistry to suggest that a school board in Columbus in 1954 could have read *Brown I* and gleaned from it a constitutional duty "to diffuse black students throughout the . . . system" or take whatever other action the Court today thinks it should have taken. And not only was the school board to anticipate the state of the law 20 years hence, but also to have a full

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[8] In fact, this theory was pressed upon the Court in *Dayton I*, Brief for Respondents, O. T. 1976, No. 76-539, pp. 58–71; yet it was implicitly rejected in this Court's detailed articulation of the proper approach to equal protection challenges involving school systems "where mandatory segregation by law of the races in the schools has long since ceased." 433 U. S., at 420.

appreciation for discrete acts or omissions of school boards 20 to 50 years earlier.[9]

Of course, there are always instances where constitutional standards evolve and parties are charged with conforming to the new standards. But I am unaware of a case where the failure to anticipate a change in the law and take remedial steps is labeled an independent constitutional violation. The difference is not simply one of characterization: the Court's decision today enunciates, without analysis or explanation, a new methodology that dramatically departs from *Keyes* by relieving school desegregation plaintiffs from any showing of a causal nexus between intentional segregative actions and the conditions they seek to remedy.

Causality plays a central role in *Keyes* as it does in all equal protection analysis. The *Keyes* Court held that before the burden of production shifts to the school board, the plaintiffs must prove "that the school authorities have carried out a systematic program of segregation *affecting a substantial portion of the students, schools, teachers, and facilities within the school system.*" 413 U. S., at 201 (emphasis added). The Court recognized that a trial court might find "that a lesser degree of segregated schooling . . . would not have resulted even if the Board had not acted as it did," and "that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention." *Id.*, at 211. The relevance of past acts of the school board was to depend on whether "segregation resulting from those actions continues to exist." *Id.*, at 210.[10] That inquiry is not central under the approach

[9] As the Court notes, incidents relied on by the District Court occurred anywhere from 1909 to 1943.

[10] "The essential element of *de jure* segregation is 'a current condition of segregation resulting from intentional state action.'" *Washington* v. *Davis*, 426 U. S. 229, 240 (1976) (quoting *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S., at 205).

approved by the Court today. Henceforth, the question is apparently whether pre-1954 acts contributed in some unspecified manner to segregated conditions that existed in 1954. If the answer is "Yes," then the only question is whether the school board has exploited all integrative opportunities that presented themselves in the subsequent 25 years. If not, a systemwide remedy is in order, despite the plaintiff's failure to demonstrate a link between those past acts and current racial imbalance.

The Court's use of the term "affirmative duty" implies that integration be the pre-eminent—indeed, the controlling—educational consideration in school board decisionmaking. It takes precedence over other legitimate educational objectives subject to some vague feasibility limitation. That implication is dramatically demonstrated in this case. Both lower courts necessarily gave special significance to the Columbus School Board's post-1954 school construction and siting policies as supporting the systemwide remedy in this case.[11] They did not find—in fact, could not have found—that the siting and construction of schools were racially motivated. As the District Court observed:

> "In 1950, pursuant to a request of the then Columbus school superintendent, the Bureau of Educational Research at The Ohio State University began a comprehensive, scientific and objective analysis of the school plant needs of the school system. The Bureau studied and re-

[11] The reliance on school construction was critical. As the Court of Appeals found, the other post-1954 incidents relied on by the District Court were "isolated," 583 F. 2d, at 805, and therefore could not have constituted a basis for a systemwide remedy. *Dayton I*, 433 U. S. 406 (1977). And the only other conduct arguably having systemwide implications, racial assignment of teachers, had been corrected, was not the subject of any remedial order, 429 F. Supp. 229, 238, 260 (SD Ohio 1977), and, in any event, could not itself support the systemwide remedy under the Sixth Circuit's own precedents. *Higgins* v. *Board of Education of City of Grand Rapids*, 508 F. 2d 779 (CA6 1974); see *Dayton II*, *post*, at 536 n. 9.

> ported on community growth characteristics, educational programs, enrollment projections, the system's plan of organization, the existing plant, and the financial ability of the community to pay for new school facilities. Thereafter, a number of general and specific recommendations were made to the Columbus Board by the Bureau. The recommendations included the size and location of new school sites as well as additions to existing sites. The recommendations were conceived to accommodate the so-called 'community or neighborhood school concept.' The 1950 concept was related to a distance criteria grounded on walking distance to schools as follows: ¾ mile for elementary, 1½ miles for junior high and 2 miles for senior high students.
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> "The Board of Education adopted and relied upon the Bureau's recommendations in proposing and encouraging the passage of bond issues in 1951, 1953, 1956, 1959 and 1964. School construction of new facilities and additions to existing structures were accomplished in substantial conformity with the Bureau's periodic studies and recommendations." 429 F. Supp. 229, 237–238 (SD Ohio 1977).

Thus, the Columbus Board of Education employed the most objective criteria possible in the placement of new schools.

Nevertheless, the District Court and Court of Appeals found that conformity with these recommendations was a violation of the Equal Protection Clause because "in some instances the need for school facilities could have been met in a manner having an integrative rather than a segregative effect." *Id.*, at 243.[12] By endorsing this logic, the Court, as a result of its

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[12] Prefacing its discussion with the observation that "in some instances initial site selection and boundary changes present integrative opportunities," 429 F. Supp., at 241, the District Court made specific findings only with respect to 2 of the 103 schools constructed between 1950 and 1975 in the Columbus school system—Gladstone Elementary and Sixth Avenue

finding of an affirmative duty, employs remedy standards to determine the existence of post-1954 violations in school construction and ignores the previously pivotal role of discriminatory purpose.[13]

Elementary—1 of which does not exist today. The sites for both schools followed recommendations by the Bureau of Education Research of Ohio State University. Ohio State University Bureau of Educational Research, The 1958–1959 Study of the Public School Building Needs of Columbus, Ohio 58 (1959) (Sixth Avenue); Ohio State University Bureau of Educational Research, The 1963–1964 Study of the Public School Building Needs of Columbus, Ohio 65 (1964) (Gladstone).

The Gladstone Elementary School opened in 1965. The "violation" inherent in that siting is described as follows by the District Court and this passage is quoted and fully adopted by the Court of Appeals.

"The need for greater school capacity in the general Duxberry area would have been logically accommodated by the construction of Gladstone north of its present location, nearer to Hudson Street. This would, of course, require some redrawing of boundary lines in order to accommodate the need for class space in Hamilton and Duxberry. If, however, the boundary lines had been drawn on a north-south pattern rather than an east-west pattern, as some suggested, the result would have been an integrative effect on Hamilton, Duxberry and the newly-constructed school." 429 F. Supp., at 242, quoted in 583 F. 2d, at 803.

Thus, the placement of Gladstone is a violation—not because the placement was racially motivated, it was demonstrably not so—but because another site would have had a more integrative impact, and it is a violation despite the determination by the Bureau of Educational Research that objective and legitimate educational criteria militated in favor of the Gladstone site.

The secondary status of educational objectives other than integration is even more obvious in the discussion of the Sixth Avenue School where the District Court characterized the relevant inquiry as whether "the objectives of racial integration would have been better served" by a different site and different boundaries. 429 F. Supp., at 243. The Sixth Avenue School does not exist any more, and students within its old boundaries attend two neighboring, racially balanced schools.

[13] This is explicitly recognized by the Court in *Dayton II*, *post*, at 538 (emphasis added):

"[T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, *not the*

This unprecedented "affirmative duty" superstructure sits atop a weak foundation—the existence of a "dual" school system in 1954. This finding was predicated on the presence

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purpose, of the actions in decreasing or increasing the segregation caused by the dual system."

But the cases relied on by the Court, *ante*, at 459, to establish this affirmative duty and its implications—*Dayton I*, *Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972), and *United States* v. *Scotland Neck Board of Education*, 407 U. S. 484 (1972)—bear absolutely no relation to the analysis in this case. The pages cited from *Dayton I* simply endorse a Court of Appeals' observation that there is nothing wrong with a school board rescinding resolutions it was under no duty to promulgate; as I have indicated, the analysis set out in *Dayton I* is entirely inconsistent with the "affirmative duty" invoked by the courts below. See n. 8, *supra*. The citation to *Wright* is equally mysterious. The city of Emporia is located in Greensville County, Va. Up until 1968, it was part of Greensville County's public school system. A desegregation lawsuit was initiated in 1965 and resulted in a court-ordered "freedom-of-choice" desegregation plan for the Greensville County schools, including those within the city of Emporia. After *Green*, the court modified its decree and ordered pairing of certain schools. The city of Emporia then announced its intention to withdraw its schools from the Greensville County school system. The District Court enjoined it from doing so because Emporia's schools had been part of the adjudicated dual system, and the court's decree would be frustrated by withdrawal of the Emporia schools. In contrast the instant case has nothing to do with frustrating outstanding court orders.

United States v. *Scotland Neck Board of Education*, *supra*, was a case where the United States Department of Justice had been negotiating with the County School Board of Halifax County, N. C., in an attempt to bring it into compliance with federal law. In 1965, the schools of Halifax County were completely segregated on the basis of race. An agreement was reached that was designed to make the Halifax County school system unitary by the 1969 school year. However, in 1969, the North Carolina Legislature authorized a new independent school district in the middle of Halifax County which was to be bounded by the city limits of Scotland Neck. The United States promptly filed suit seeking desegregation of the Halifax County schools and an injunction blocking Scotland Neck's withdrawal. The District Court ordered desegregation of the Halifax County schools and enjoined creation of the independent Scotland Neck district. This Court held, quoting *Wright*, that if the

of four predominantly black elementary schools and one predominantly black junior high school on the "near east side of Columbus," a then and now black residential area. The Columbus School Board at that time employed, as it does now, a neighborhood school policy. The specific Board actions that the District Court cited were racial assignment of teachers and gerrymandering along part of the border between two school districts.[14] The Court concludes that these violations involved a substantial part of the Columbus school system in 1954, and invokes *Keyes* for the proposition that the finding of a dual school system follows "absent sufficient contrary proof by the Board, which was not forthcoming in this case." *Ante*, at 458.

There are two major difficulties with this use of *Keyes*. First, without any explanation, the Court for the first time applies it to define the character of a school system remote in time—here 25 or more years ago—without any examination of the justifications for the *Keyes* burden-shifting principles when those principles are used in this fashion. Their use is a matter of " 'policy and fairness,' " 413 U. S., at 209 (quoting 9 J. Wigmore, Evidence § 2486, p. 275 (3d ed. 1940)), and I think the *Keyes* "presumption" scores poorly on both counts when focused on a period beyond memory and often beyond

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Scotland Neck " 'proposal would impede the dismantling of a dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out.' " 407 U. S., at 489. There is certainly no support in *Scotland Neck* for the analysis employed today, and the Court offers no explanation.

[14] As the Court today acknowledges, *Dayton II*, *post*, at 536 n. 9, racial assignment of teachers does not make out a *Keyes* showing regarding racial assignment of students. And testimony on the existence of gerrymandering went little beyond the establishment of an irregular boundary line. Testimony of W. A. Montgomery, App. 389–390. Cf. *Wright* v. *Rockefeller*, 376 U. S. 52 (1964). The District Court conceded that at the time of *Brown I*, there was "substantial racial mixing of both students and faculty in some schools" in the Columbus system. 429 F. Supp., at 236.

records.[15] What records are available are equally available to both sides. In this case the District Court relied almost exclusively on instances that occurred between 1909 and 1943: undoubtedly beyond the period when many Board members had their experiences with the system as students, let alone as administrators. It is much more difficult for school board authorities to piece together the influences that shaped the racial composition of a district 20, 30, or 40 years ago. The evidence on both sides becomes increasingly anecdotal. Yet the consequences of the School Board's inability to make such a showing only become more dramatic. Here violations with respect to 5 schools, only 3 of which exist today, occurring over 30 years ago are the key premise for a systemwide racial

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[15] "The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." E. Cleary, McCormick on Evidence 786 (2d ed. 1972).

There is a policy judgment sometimes made, which "should not be overemphasized," *id.*, at 787, that the facts on a particular issue are so peculiarly within the knowledge of a certain party that the burden of proof on that issue should be allocated to him. Whatever the merits of the burden-shift to the school board where contemporaneous board decisions are at issue, see *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S., at 262–263 (REHNQUIST, J., dissenting), they do not commend a burden-shift regarding conduct 25 or more years ago.

The Court charges that in questioning the propriety of employing the *Keyes* burden-shift in this case, we "claim a better grasp of the historical and ultimate facts than the two courts below had." *Ante*, at 457 n. 6. But the *Keyes* burden-shift is not an ultimate finding of fact at all. It is a creature of this Court, brought into play by the making of only a prima facie showing, and applied in this case in a completely novel way. To criticize its use is not to upset "factfinding," but to criticize the absence of findings of fact which have heretofore been thought necessary in order to support the sort of remedy imposed by the District Court. Its use here is surely no less a subject for this Court's review than it was in *Keyes* itself.

balance remedy involving 172 schools—most of which did not exist in 1950.[16]

My second concern about the Court's use of the *Keyes* presumption may render my first concern academic. For as I suggest in Part III below, the Court today endorses views regarding the neighborhood school policy and racially identifiable neighborhoods that essentially make the *Keyes* presumption irrebuttable.

II

The departure from established doctrines of causation and discriminatory purpose does not end with the lower courts' preoccupation with an "affirmative duty" exhumed from the conduct of past generations to be imposed on the present without regard to the forces that actually shaped the current racial imbalance in the school system. It is also evident in their examination of post-1954 violations, which the Court refers to as "the intentionally segregative use of optional attendance zones, discontiguous attendance areas, and boundary changes." *Ante*, at 461–462 (footnotes omitted).

As a preliminary matter, I note that the Court of Appeals observed, I think correctly, that these post-1954 incidents "can properly be classified as isolated in the sense that they do not form any systemwide pattern." 583 F. 2d, at 805. All the incidents cited, let alone those that can meet a properly applied segregative intent standard, could not serve as the basis for a systemwide racial balance remedy.

In *Washington* v. *Davis*, 426 U. S. 229 (1976), *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252

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[16] The Columbus school system has changed dramatically in the last 25 years. The city grew from 40 square miles in 1950 to 173 square miles in 1975, and its student enrollment more than doubled. Many of the system's schools serve areas that were undeveloped in 1950. One hundred and three new school buildings were added during this period and 145 additions were made to existing buildings. On average, over 100 new classrooms were built each year.

(1977), and *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256 (1979), we have emphasized that discriminatory purpose as a motivating factor in governmental action is a critical component of an equal protection violation. Like causation analysis, the discriminatory-purpose requirement sensibly seeks to limit court intervention to the rectification of conditions that offend the Constitution—stigma and other harm inflicted by racially motivated governmental action—and prevent unwarranted encroachment on the autonomy of local governments and private individuals which could well result from a less structured approach.

This Court has not precisely defined the manner in which discriminatory purpose is to be proved. Indeed, in light of the varied circumstances in which it might be at issue, simple and precise rules for proving discriminatory purpose could not be drafted. The focus of the inquiry in a case such as this, however, is not very difficult to articulate: Is a desire to separate the races among the reasons for a school board's decision or particular course of action? The burden of proof on this issue is on the plaintiffs. *Washington* v. *Davis*, *supra*, at 244–245; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, *supra*, at 270.

The best evidence on this score would be a contemporaneous explanation of its action by the school board, or other less dramatic evidence of the board's actual purpose, which indicated that one objective was to separate the races. See *Arlington Heights*, *supra*, at 268. Objective evidence is also probative. Indeed, were it not, this case would warrant very little discussion, for all the evidence relied on by the courts below was of an "objective" nature.

But objective evidence must be carefully analyzed for it may otherwise reduce the "discriminatory purpose" requirement to a "discriminatory impact" test by another name. Private and governmental conduct in matters of general importance to the community is notoriously ambiguous, and for

objective evidence to carry the day it must be a reliable index of actual motivation for a governmental decision—at least sufficient to meet the plaintiff's burden of proof on purpose or intent. We have only recently emphasized:

> " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney, supra,* at 279.

The maintenance of this distinction is important: both to limit federal courts to their constitutional missions and to afford school boards the latitude to make good-faith, color-blind decisions about how best to realize legitimate educational objectives without extensive *post hoc* inquiries into whether integration would have been better served—even at the price of other educational objectives—by another decision: a different school site, a different boundary, or a different organizational structure. In a school system with racially imbalanced schools, *every* school board action regarding construction, pupil assignment, transportation, annexation, and temporary facilities will promote integration, aggravate segregation, or maintain segregation. Foreseeability follows from the obviousness of that proposition. Such a tight noose on school board decisionmaking will invariably move government of a school system from the townhall to the courthouse.

The District Court in this case held that it was bound by the standard for segregative intent articulated by the Court of Appeals for the Sixth Circuit in *Oliver* v. *Michigan State Board of Education,* 508 F. 2d 178, 182 (1974):

> "A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation.

> The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies." 429 F. Supp., at 254 n. 3.

This is precisely the type of "impact" trigger for shifting the burden of proof on the intent component of an equal protection violation that we rejected in *Washington* v. *Davis, supra.* There the Court of Appeals had applied the standards of Title VII to determine whether a qualifying test for police candidates discriminated against blacks in violation of the Equal Protection Clause. According to the Court of Appeals, the plaintiffs were initially required to show disproportionate impact on blacks.[17] That impact was a constitutional violation absent proof by the defendants that the test was "an adequate measure of job performance in addition to being an indicator of probable success in the training program." 426 U. S., at 237. Put differently, the defendants were to show that the test was the product of a racially neutral policy. This Court reversed, rejecting "the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation." *Id.*, at 245.

Indeed, reflection indicates that the District Court's test for segregative intent in this case is logically nothing more than the affirmative duty stated a different way. Under the test, a "presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result

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[17] To add the word "foreseeable" does not change the analysis, because the police department in *Davis* would be hard pressed to say that the disparate impact of the examination was unforeseeable. It is well documented that minorities do not perform as well as Anglo-Americans on standardized exams—principally because of cultural and socioeconomic differences. The *Davis* Court implicitly recognized that the impact in that and similar cases was foreseeable. 426 U. S., at 248, and n. 14. See *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U. S. 256, 278–279 (1979).

of public officials' . . . inaction was . . . perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their . . . inaction was a consistent and resolute application of racially neutral policies." If that standard were to be applied to the average urban school system in the United States, the implications are obvious. Virtually every urban area in this country has racially and ethnically identifiable neighborhoods, doubtless resulting from a mélange of past happenings prompted by economic considerations, private discrimination, discriminatory school assignments, or a desire to reside near people of one's own race or ethnic background. See *Austin Independent School Dist.* v. *United States*, 429 U. S. 990, 994 (1976) (POWELL, J., concurring). It is likewise true that the most prevalent pupil assignment policy in urban areas is the neighborhood school policy. It follows inexorably that urban areas have a large number of racially identifiable schools.

Certainly "public officials' . . . inaction . . . perpetuat[es] . . . public school segregation" in *this* context. School authorities could move to pairing, magnet schools, or any other device to integrate the races. The failure to do so is a violation under *Oliver* unless the "inaction was a consistent and resolute application of racially neutral policies." The policy that most school boards will rely on at trial, and the policy which the Columbus School Board in fact did rely on, is the neighborhood school policy. According to the District Court in this case, however, not only is that policy not a defense, but in combination with racially segregated housing patterns, it is itself a factor from which one can infer segregative intent and a factor in this case from which the District Court did infer segregative intent, stating that "[t]hose who rely on it as a defense to unlawful school segregation fail to recognize the high priority of the constitutional right involved." 429 F. Supp., at 258.

But the Constitution does not command that school boards not under an affirmative duty to desegregate follow a policy of "integration über alles." If the Court today endorses that view, and unfortunately one cannot be sure, it has wrought one of the most dramatic results in the history of public education and the Constitution. A duty not to discriminate in the school board's own actions is converted into a duty to ameliorate or compensate for the discriminatory conduct of other entities and persons.

I reserve judgment only because the Court at points in its opinion seems of the view that the District Court applied a test other than the *Oliver* test for segregative intent, despite the District Court's clear indication to the contrary. 429 F. Supp., at 253–254, n. 3. In fact, in *Dayton II*, *post*, at 536 n. 9, the Court expressly rejects the *Oliver* test, and in its opinion in this case, *ante*, at 464–465, indicates that the District Court treated foreseeable effects as only another bit of evidence and finds that not incompatible with this Court's prior cases.

> "Those cases do not forbid 'the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn.' [429 F. Supp.], at 255. Adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.' *Ibid.*"

I have no difficulty with the proposition that foreseeable effects are permissible considerations "as one of the several kinds of proofs" as long as they are not the only type of proof. Use of foreseeable effects in the latter fashion would be clearly inconsistent with *Davis*, *Arlington Heights*, and *Feeney*. But I do have great difficulty with this Court's taking the above

quotations from the District Court out of context and thereby imputing a general test for discriminatory purpose to the District Court from a passage which in fact was part of a discussion of the probativeness of a very special kind of evidence on intent: a neighborhood school policy *simpliciter*.[18] As far as gauging the purpose underlying specific actions is concerned, it is quite clear from its expression and application of the relevant test for intent, that the District Court looked for foreseeability *per se*.[19]

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[18] Specifically, the District Court prefaced its discussion of the neighborhood school policy with the following question:

"If a board of education assigns students to schools near their homes pursuant to a neighborhood school policy, and does so with full knowledge of segregated housing patterns and with full understanding of the foreseeable racial effects of its actions, is such an assignment policy a factor which may be considered by a court in determining whether segregative intent exists? A *majority* of the United States Supreme Court has not directly answered this question regarding *non-racially motivated inaction*." 429 F. Supp., at 254 (latter emphasis added).

Before today, I would have thought that the question whether *nonracially* motivated inaction was probative on discriminatory purpose would answer itself with an emphatic "No." We have to date indicated that only *racially* motivated governmental decisionmaking is addressed by the Equal Protection Clause. It was in the course of reasoning to an affirmative answer to this question that the District Court made the first observation quoted by the Court, *i. e.*, that the foreseeable effects of *nonracially motivated inaction* is probative on segregative intent. And the second quotation lifts the District Court's conclusion on this issue out of context.

"*Substantial adherence to the neighborhood school concept* with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn." *Id.*, at 255 (emphasis added).

Thus the interesting proposition, worthy of Lewis Carroll at his best, that a *lack of discriminatory purpose* will not *by itself* support an inference of *discriminatory purpose*.

[19] In its general discussion of discriminatory intent or purpose, the District Court defines the relevant test as follows:

"The intent contemplated as necessary proof can best be described as

As such, the District Court's treatment of specific post-1954 conduct reflects the same cavalier approach to causality and purpose that underlies the 1954 affirmative duty. That determination requires no more "omnipotence and omniscience," *ante*, at 457 n. 6, than similar determinations in *Dayton I*, *Davis*, and *Arlington Heights*. The court found violations with respect to three optional attendance zones. The Near-Bexley zone, the only zone discussed by this Court, afforded students the option to attend schools in either one of two bordering districts. The District Court found that the zone gave white students of Bexley the opportunity to avoid attending the predominantly black schools to the east. I do not think that the District Court finding can be said to be clearly erroneous despite the lack of any direct evidence on discriminatory purpose, for the School Board did not suggest any educational justification for this zone and none is apparent. But as that court recognized, the zone is of little significance as far as the current state of segregation in the school system is concerned. *"The July 10, 1972, minutes of the State Board of Education . . . appear to indicate that in 1972, there were 25 public elementary school students and two public high school students residing in the optional zone."* 429 F. Supp., at 245 (emphasis added). As of 1975, the zone has been dismantled, and the District Court clearly suggests that it does not have any current effect on the Columbus school system.[20]

Two other optional attendance zones were identified as offen-

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it is usually described—intent embodies the expectations that are the natural and probable consequences of one's act or failure to act. That is, the law presumes that one intends the natural and probable consequences of one's actions or inactions." *Id.*, at 252.

See *id.*, at 253–254, n. 3.

[20] *Id.*, at 245:

"The Court is not so concerned with the numbers of students who exercised or could have exercised this option, as it is with the light that the creation and maintenance of the option sheds upon the intent of the Columbus Board of Education."

sive. One existed for two years, between 1955 and 1957, and permitted students in a predominantly white neighborhood to attend the "white" West Broad Elementary School rather than the predominantly black Highland School. Like the Near-Bexley option, there is no apparent educational justification and, therefore, no grounds to upset the District Court's finding of a violation. This optional zone afforded the District Court an excellent opportunity to probe the effects of a past violation, because in 1957 the optional zone was made a permanent part of the West Broad district. But the District Court made no findings as to the current effect of the past violation nor saw fit to hypothesize how many students might have been affected. It was clearly of the opinion that no such inquiry was necessary.

The final optional attendance zone demonstrates the influence of the "affirmative duty"—whether the 1954 variety or that which follows from *Oliver*. This optional zone was also created in 1955 in roughly the same part of Columbus. It gave some students within Highland's boundaries the option of attending the neighboring West Mound Street Elementary School. Again, the District Court found, this permitted transfer to a "whiter" school. But the District Court also found that there was a legitimate educational objective for creation of the zone: Highland was overcrowded and West Mound was under capacity. The District Court, however, concluded that the School Board's actions were objectionable because "feasible alternatives" were available; that is, other optional attendance zones could have been drawn which would have had "an integrative effect on West Mound." This again suggests a duty on the School Board to select the most integrative alternative.

The second set of post-1954 actions faulted by the District Court were two discontiguous attendance areas. These were situations where students in a defined geographical area were assigned to a school in a zone not contiguous with their neigh-

borhood. One zone was established in 1963 and involved about 70 students. The School Board unsuccessfully argued at trial that the children were sent to the predominantly white Moler Elementary School because the nearest school, the predominantly black Alum Crest Elementary, had no room for them. The District Court indicates that this violative condition existed until 1969, presumably because after that date the discontiguous area had a substantial black population and an integrative effect on the Moler Elementary School. Since the discontiguous area now has an integrative effect, one might ask what is its current segregative effect on the school system? Ironically, under the District Court's reasoning, it would be a violation for the Columbus School Board to now disband the Moler Elementary discontiguous attendance area.

The second discontiguous zone existed from 1957 to 1963 and permitted students on three streets within the Heimandale Elementary District to attend the "whiter" Fornof Elementary School. The Columbus School Board "inherited" this discontiguous attendance arrangement when it annexed the Marion-Franklin District in 1957. Both schools at that time were at or over capacity and when a six-classroom addition was made to Heimandale in 1963, the discontiguous zone was terminated and the children assigned to Heimandale. According to the HEW Civil Rights Survey, Heimandale today is a racially balanced school. App. 747. The District Court made no findings as to the current effect of the Board's 5-year retention of the Heimandale-Fornof arrangement.

The last discrete violation discussed by the District Court involved the Innis-Cassady alternative organizational proposals. These proposals involved an area of the Columbus school district that was annexed in 1971. The area had one school, the Cassady Elementary School, which was very overcrowded, and placing another school in the district was a priority for the Columbus School Board in 1972. The District Court did not fault the site chosen for the second school in the old Mifflin District. However, it inferred segregative

intent in the School Board's decision to use a K–6 organization in both schools, rather than using K–3 organization in one school and 4–6 organization in the other and thereby drawing students from throughout the district. The District Court found that the latter would have been the more integrative alternative because of residential segregation in the district. At trial, the School Board attempted to justify its choice by pointing out that the pairing alternative would have required substantial transportation and a deviation from the standard K–6 organization employed throughout the Columbus school system. The court found "no evidence in this record" that pairing would have necessitated "substantial transportation" and that the Board had on prior occasions used a K–3 structure—apparently a reference to the K–3 primary center for crippled children.[21]

Thus, the Innis-Cassady discussion evinces this same affirmative duty to select the more integrative alternative and a consequent shift of the burden of proof to the School Board to prove that the segregative choice was mandated by other legitimate educational concerns. But under *Washington* v. *Davis* and *Arlington Heights* the burden is on the plaintiffs to show impact and purpose, and in a situation where there is "no evidence" in the record to prove or disprove a proffered justification for a school board decision, the plaintiffs have failed to establish a violation of their constitutional rights.

Secondly, the fact that a school board has once or twice or three times in the past deviated from a policy does not impugn that policy as a justification for a school board decision. There is no constitutional requirement of perfect consistency. *Arlington Heights*, 429 U. S., at 269. The fact that the Columbus School Board currently maintains a K–3 orga-

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[21] There were apparently only two other instances where the Columbus School Board has had K–3 primary units and both of those were to supplement overcrowding in the lower grades of K–6 home schools. *Id.*, at 249.

nization for crippled children hardly diminishes the Board's interest in maintaining a standard organizational structure for traditional schools throughout the school district.[22] Rather, in *Arlington Heights* we spoke of substantive *departures* from existing policy as casting light on discriminatory purpose, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.*, at 267.

Thus, it is clear that with respect to a number of the post-1954 actions that the District Court found to be independent violations, foreseeability was not one kind of evidence, but the whole ball game—whether the District Court thought that result dictated by the *Oliver* test or the post-1954 "affirmative duty" purportedly imposed as a result of pre-1954 conduct. Those findings that could be supported by the concept of discriminatory purpose propounded in *Davis* and *Arlington Heights* were not accompanied by any effort to link those violations with current conditions of segregation in the school system. In sum, it is somewhat misleading for the Court to refer to these actions as in some sense independent of the constitutional duty it suggests that the Columbus Board assumed in 1954. And, in any event, the small number of students involved in these instances could not independently support the sweeping racial balance remedy imposed by the District Court. Cf. *Dayton I*, 433 U. S. 406 (1977).

III

The casualness with which the District Court and Court of Appeals assumed that past actions of the Board had a

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[22] There is substantial discussion in the District Court's opinion about various groups that gave the Columbus School Board notice that certain decisions would have a segregative rather than integrative impact. *Id.*, at 255–256. But notice in and of itself only goes so far as to establish foreseeability, and foreseeability itself is not the ultimate fact in issue if we continue to adhere to *Davis* and *Arlington Heights*.

continuing effect on the school system, and the facility and doctrinal confusion with which they went from these actions to announce a "systemwide violation" undermine the basic limitations on the federal courts' authority. If those violations are not the product of a careful inquiry of the impact on the current school system, if they are reaction to taint or atmosphere rather than identifiable conditions that would not exist now "but for" the constitutional violation, there are effectively no limits on the ability of federal courts to supplant local authority. Only two Terms ago, in *Dayton I*, *supra*, at 420, we set out the basic line of inquiry that should govern school desegregation litigation:

> "The duty of both the District Court and the Court of Appeals in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minority pupils, teachers, or staff. *Washington* v. *Davis*, *supra*. All parties should be free to introduce such additional testimony and other evidence as the District Court may deem appropriate. If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy. *Keyes*, 413 U. S., at 213."

See also *School Dist. of Omaha* v. *United States*, 433 U. S. 667 (1977); *Brennan* v. *Armstrong*, 433 U. S. 672 (1977).

The District Court made no attempt to determine the incremental segregative effects of identified violations; given the absence of causality considerations in the court's findings, it was simply not in a position to do so.[23] To distinguish *Dayton I*, the majority relies on the District Court's conclusion that its "finding of liability in this case concerns the Columbus school district as a whole." 429 F. Supp., at 266. But incantation is not a substitute for analysis and the District Court's findings and analysis do not support its conclusion.

But the majority's opinion takes on its most delusive

[23] *Dayton I* was handed down after the liability phase of this case. It was brought to the District Court's attention while it was considering the remedy, and the District Court dismissed it as simply reiterating the maxim that "the nature of the violation determines the scope of the remedy." Certainly *Dayton I* was a much more precise articulation of what implementing that maxim entailed than is found in this Court's prior cases. And the Court of Appeals' explanation of "incremental segregative effect" in this case communicates no clear conception of the type of inquiry into causation that *Dayton I* requires.

"It is clear to us that the phrases 'incremental segregative effect' and 'systemwide impact' employed in the *Dayton* case require that the question of systemwide impact be determined by judging segregative intent and impact as to each isolated practice, or episode. Each such practice or episode inevitably adds its own 'increment' to the totality of the impact of segregation. *Dayton* does not, however, require each of fifty segregative practices or episodes to be judged solely upon *its* separate impact on the system. The question posed concerns the impact of the total amount of segregation found—after each separate practice or episode has added its 'increment' to the whole. It was not just the last wave which breached the dike and caused the flood." 583 F. 2d, at 813–814 (emphasis in original).

In *Brinkman* v. *Gilligan*, 583 F. 2d 243, 257 (CA6 1978), the court's description becomes metaphysical:

"The word 'incremental' merely describes the manner in which segregative impact occurs in a northern school case where each act, even if minor in itself, adds incrementally to the ultimate condition of segregated schools. The impact is 'incremental' in that it occurs gradually over the years instead of all at once as in a case where segregation was mandated by a state statute or a provision of a state constitution."

air when the Court suggests that the scope of the remedy is the Board's own fault.

> "[T]he Board was given ample opportunity to counter the evidence of segregative purpose and current, systemwide impact, and the findings of the courts below were against it in both respects." *Ante,* at 468.

Specifically, the Court is alluding to the Board's purported failure to show that the violation was not systemwide under *Keyes* or that a more limited remedy should have been applied under *Swann.* In fact, the logic of the District Court, apparently endorsed by the Court today, turns the *Swann* and *Keyes* showings into chimeras.

Once a showing is made that the District Court believes satisfies the *Keyes* requirement of purposeful discrimination in a substantial part of the school system, the School Board will almost invariably rely on its neighborhood school policy and residential segregation to show that it is not responsible for the existence of certain predominantly black and white schools in other parts of the school system. Under the District Court's reasoning, as I have noted, not only is that evidence not probative on the Board's lack of responsibility, it itself supports an inference of a constitutional violation. In addition, the District Court relied on a general proposition that "there is often a substantial reciprocal effect between the color of the school and the color of the neighborhood it serves" to block any inquiry into whether racially identifiable schools were the product of racially identifiable neighborhoods or whether past discriminatory acts bore a "but for" relationship to current segregative conditions.[24]

> "It is not now possible to isolate these factors and draw

[24] This empirical observation was not the product of evidence about Columbus, but general opinions expressed by two experts, Dr. Karl Taeuber and Martin Sloane; the latter testified on federal housing policy in the United States. As MR. JUSTICE POWELL has noted, experts have found that residential segregation exists " 'regardless of the character of

a picture of what Columbus schools or housing would have looked like today without the other's influence. *I do not believe that such an attempt is required.*

"I do not suggest that any reasonable action by the school authorities could have fully cured the evils of residential segregation. The Court could not and would not impose such a duty upon the defendants. I do believe, however, that the Columbus defendants could and should have acted to break the segregative snowball created by their interaction with housing. That is, they could and should have acted with an integrative rather than a segregative influence upon housing; they could and should have been cautious concerning the segregation influences that are exerted upon the schools by housing. They certainly should not have aggravated racial imbalance in the schools by their official actions." 429 F. Supp., at 259 (emphasis added).

But, as the District Court recognized, other factors play an important role in determining segregated residential patterns.

"Housing segregation has been caused in part by federal agencies which deal with financing of housing, local housing authorities, financing institutions, developers, landlords, personal preferences of blacks and whites, real estate brokers and salespersons, restrictive covenants,

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local laws and policies, and regardless of the extent of other forms of segregation or discrimination.'" *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S., at 223 n. 9 (concurring in part and dissenting in part) (quoting Dr. Taeuber).

Dr. Taeuber credited residential segregation to economics, choice, and discrimination. In the latter category he included racially motivated site selection in public housing and urban renewal programs, restrictive covenants in housing deeds, lending policies of financial institutions, practices of the real estate industry, and zoning policies. Entering into all of this in some unspecified manner is the influence of school attendance zones. Testimony of Dr. Karl Taeuber, App. 280–311.

zoning and annexation, and income of blacks as compared to whites." *Ibid.*

The *Swann* Court cautioned that "[t]he elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage." 402 U. S., at 22. Yet today the School Board is called to task for all the forces beyond its control that shaped residential segregation in Columbus. There is thus no room for *Keyes* or *Swann* rebuttal either with respect to the school system today or that of 30 years ago.

IV

I do not suggest that the inquiry required by *Dayton I* and *Keyes* is a simple one, and reviewing courts must defer to the findings of district court judges. But appellate courts also must ensure that these judges are asking themselves the right questions: it is clear in the instant case that critical questions regarding causality and purpose were not asked at all. The city of Columbus has changed enormously in the last 25 years and with it the racial character of many neighborhoods. Incidents related here may have been paved over by years of private choice as well as undesirable influences beyond the control of school authorities, influences such as poverty and housing discrimination, both public and private. Expert testimony should play an important role in putting together the demographic history of a city and the role of a school board in it. I do not question that there were constitutional violations on the part of the Columbus School Board in the past, but there are no deterrence or retribution components of the rationale for a school desegregation remedy. The fundamental mission of such remedies is to restore those integrated educational opportunities that would now exist but for purposefully discriminatory school board conduct. Because critically important questions were neither asked nor answered

by the lower courts, the record before us simply cannot inform as to whether so sweeping a remedy as that imposed is justified.

At the beginning of this dissent, far too many pages ago, I suggested that the Court's opinion may only communicate a "hands-off" attitude in school desegregation cases and that my concerns should therefore be institutional rather than doctrinal. School desegregation cases, however, will certainly be with this Court as long as any of its current Members, and I doubt the Court can for long, like Pilate, wash its hands of disparate results in cases throughout the country.

It is most unfortunate that the Court chooses not to speak clearly today. *Dayton I* and *Keyes* are not overruled, yet their essential messages are ignored. The Court does not intimate that it has fathomed the full implications of the analysis it has sanctioned—an approach that would certainly make school desegregation litigation a "loaded game board," *Swann*, 402 U. S., at 28, but one at which a school board could never win. A school system's only hope of avoiding a judicial receivership would be a voluntary dismantling of its neighborhood school program. If that is the Court's intent today, it has indeed accepted the role of Judge Learned Hand's feared "Platonic Guardians," [25] and intellectual integrity—if not the Constitution or the interests of our beleaguered urban school systems and their students of all races—would be better served by discarding the pretextual distinction between *de facto* and *de jure* segregation. Whether the Court's result be reached by the approach of Pilate or Plato, I cannot subscribe to it.

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[25] L. Hand, The Bill of Rights 73 (The Oliver Wendell Holmes Lectures, 1958):

"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."

DAYTON BOARD OF EDUCATION ET AL. *v.* BRINKMAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78–627. Argued April 24, 1979—Decided July 2, 1979

A number of students in the Dayton, Ohio, school system, through their parents, brought this action in District Court in 1972, alleging that the Dayton Board of Education, the State Board of Education, and various local and state officials were operating a racially segregated school system in violation of the Equal Protection Clause of the Fourteenth Amendment. After protracted litigation at both the trial and appellate levels, the District Court dismissed the complaint, ruling that, although the Dayton Schools concededly were highly segregated, the Dayton Board's failure to alleviate this condition was not actionable absent sufficient evidence that the racial separation had been caused by the Board's own purposeful discriminatory conduct. In the District Court's view, plaintiffs had failed to show either discriminatory purpose or segregative effect, or both, with respect to the Board's challenged practices and policies, which included faculty hiring and assignments, the use of optional attendance zones and transfer policies, the location and construction of new and expanded school facilities, and the rescission of certain prior resolutions recognizing the Board's responsibility to eradicate racial separation in the public schools. The Court of Appeals reversed, holding that at the time of *Brown* v. *Board of Education,* 347 U. S. 483 (*Brown I*), in 1954, the Dayton Board had operated a racially segregated, dual school system, that it was constitutionally required to disestablish that system and its effects, that it had failed to discharge this duty, and that the consequences of the dual system together with the intentionally segregative impact of various practices since 1954, were of systemwide import and an appropriate basis for a systemwide remedy.

Held:

1. On the record, there is no basis for disturbing the Court of Appeals' holding that at the time of *Brown I* the Dayton Board was intentionally operating a dual school system in violation of the Equal Protection Clause. Pp. 534–537.

2. Given the fact that a dual system existed in 1954, the Court of Appeals also properly held that the Dayton Board was thereafter under a continuing duty to eradicate the effects of that system, and that the

systemwide nature of the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts. Part of the affirmative duty imposed on a school board is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects, *Wright* v. *Council of City of Emporia*, 407 U. S. 451, and here the Dayton Board had engaged in many post-*Brown I* actions that had the effect of increasing or perpetuating segregation. The measure of a school board's post-*Brown I* conduct under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system. The Dayton Board had to do more than abandon its prior discriminatory purpose, *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189; *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1. The Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices were not used and did not serve to perpetuate or re-establish the dual system, and has a "heavy burden" of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends. Pp. 537–540.

3. Nor is there any reason to fault the Court of Appeals' finding after the remand of this case in *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, that a sufficient case of current, systemwide effect had been established. This was not a misuse of *Keyes, supra*, where it was held that "purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a systemwide discriminatory intent unless otherwise rebutted" and that "given the purpose to operate a dual school system one could infer a connection between such a purpose and racial separation in other parts of the school system." *Columbus Board of Education* v. *Penick, ante*, at 467–468. The Court of Appeals was also justified in utilizing the Dayton Board's failure to fulfill its affirmative duty and its conduct perpetuating or increasing segregation to trace the current, systemwide segregation back to the purposefully dual system of the 1950's and the subsequent acts of intentional discrimination. Pp. 540–542.

583 F. 2d 243, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., joined, *ante*, p. 469. POWELL, J., filed a dissenting opinion, *ante*, p. 479. REHNQUIST, J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 542.

David C. Greer argued the cause for petitioners. With him on the brief was *Leo F. Krebs.*

William E. Caldwell argued the cause for respondents. With him on the brief were *Nathaniel R. Jones, Paul R. Dimond, Louis R. Lucas, Robert A. Murphy, Norman J. Chachkin,* and *Richard Austin. Armistead W. Gilliam, Jr.,* and *Charles J. Faruki* filed a brief for the Ohio State Board of Education et al. as respondents under this Court's Rule 21 (4).

Assistant Attorney General Days argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Wallace, Sara Sun Beale, Brian K. Landsberg,* and *Robert J. Reinstein.**

MR. JUSTICE WHITE delivered the opinion of the Court.

This litigation has a protracted history in the courts below and has already resulted in one judgment and opinion by this Court. *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977) (*Dayton I*). In its most recent opinion, the

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**Richard S. Gebelein,* Attorney General of Delaware, *Regina M. Small,* Deputy Attorney General, *Mason E. Turner, Jr., James T. McKinstry,* and *Philip B. Kurland* filed a brief for the Delaware State Board of Education et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Burt Neuborne, E. Richard Larson, Robert Allen Sedler, Winn Newman,* and *Carole W. Wilson* for the American Civil Liberties Union et al.; by *Arthur J. Lesemann* for the Fair Housing Council of Bergen County, N. J.; by *Jack Greenberg, James M. Nebrit III, Bill Lann Lee, Joseph L. Rauh, Jr., John Silard, Elliott C. Lichtman,* and *John Fillion* for the NAACP Legal Defense and Educational Fund, Inc., et al.; and by *Stephen J. Pollak, Richard M. Sharp, Wendy S. White,* and *David Rubin* for the National Education Association et al.

Briefs of *amici curiae* were filed by *Harriet F. Pilpel, Nathan Z. Dershowitz,* and *Joseph B. Robison* for the American Jewish Congress; by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation; and by *Duane W. Krohnke* for Special School District No. 1, Minneapolis, Minn.

United States Court of Appeals for the Sixth Circuit approved a systemwide plan for desegregating the public schools of Dayton, Ohio. *Brinkman* v. *Gilligan,* 583 F. 2d 243 (1978). The Court of Appeals found that the Dayton Board of Education had operated a racially segregated, dual school system at the time of *Brown* v. *Board of Education,* 347 U. S. 483 (1954) (*Brown I*), and that "[t]he evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination" and "actually have exacerbated the racial separation existing at the time of *Brown I.*" 583 F. 2d, at 253. We granted certiorari, 439 U. S. 1066 (1979), and heard argument in this case in tandem with *Columbus Board of Education* v. *Penick, ante,* p. 449. We now affirm the judgment of the Court of Appeals.

I

The public schools of Dayton are highly segregated by race. In the year the complaint was filed, 43% of the students in the Dayton system were black, but 51 of the 69 schools in the system were virtually all white or all black.[1] *Brinkman* v.

[1] The Court of Appeals set out the undisputed statistics:

" 'Enrollment data from the Dayton system reveals the substantial lack of progress that has been made over the past 23 years in integrating the Dayton school system. In 1951–52, of 47 schools, 38 had student enrollments 90 per cent or more one race (4 black, 34 white). Of the 35,000 pupils in the district, 19 per cent were black. Yet over half of all black pupils were enrolled in the four *all* black schools; and 77.6 per cent of all pupils were assigned to virtual one race schools. "Virtual one race schools" refers to schools with student enrollments of 90 per cent or more one race. In 1963–64, of 64 schools, 57 had student enrollments 90 per cent or more one race (13 black, 44 white). Of the 57,400 pupils in the district, 27.8 per cent were black. Yet 79.2 per cent of all black pupils were enrolled in the 13 black schools; and 88.8 per cent of all pupils were enrolled in such one race schools.

" 'In 1971–72 (the year the complaint was filed), of 69 schools, 49 had student enrollments 90 per cent or more one race (21 black, 28 white). Of the 54,000 pupils 42.7 per cent were black; and 75.9 per cent of all

Gilligan, 446 F. Supp. 1232, 1237 (SD Ohio 1977). A number of students in the Dayton system, through their parents, brought this action on April 17, 1972, alleging that the Dayton Board of Education, the State Board of Education, and the appropriate local and state officials [2] were operating a racially segregated school system in violation of the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs sought a court order compelling desegregation. The District Court sustained their challenge, determining that certain actions by the Dayton Board amounted to a "cumulative" violation of the Fourteenth Amendment. *Id.*, at 1259.[3] The District Court also approved a plan having limited remedial objectives.

The District Court's judgment that the Board had violated the Fourteenth Amendment was affirmed by the Court of Appeals; but after twice being reversed on the ground that the prescribed remedy was inadequate to eliminate all vestiges of state-imposed segregation, the District Court ordered the

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black students were assigned to the 21 black schools. In 1972–73 (the year the hearing was held) of 68 schools, 47 were virtually one race (22 black, 25 white); fully 80 per cent of all classrooms were virtually one race. (Of the 50,000 pupils in the district, 44.6 per cent were black).

"'*Every* school which was 90 per cent or more black in 1951–52 *or* 1963–64 *or* 1971–72 and which is still in use today remains 90 per cent or more black. Of the 25 white schools in 1972–73, *all* opened 90 per cent or more white and, if open, were 90 per cent or more white in 1971–72, 1963–64 and 1951–52.'" *Brinkman* v. *Gilligan*, 583 F. 2d 243, 254 (CA6 1978) (emphasis in original), quoting *Brinkman* v. *Gilligan*, 503 F. 2d 684, 694–695 (CA6 1974).

[2] In the last stages of this litigation, respondents did not press their claims against the state officials. Only the Dayton Board and local officials petitioned for writ of certiorari.

[3] The violation found by the District Court had three major components: first, the marked racial separation of students, which the Board had made no significant effort to alter; second, the utilization of optional attendance zones, in some cases racially motivated and having significant segregative effect in two high school zones; and third, the Board's rescission of previously adopted resolutions recognizing the Board's role in racial segregation and its responsibility to eradicate the existing pattern.

Board to take the necessary steps to assure that each school in the system would roughly reflect the systemwide ratio of black and white students. App. to Pet. for Cert. 103a.[4] The Court of Appeals then affirmed. *Brinkman* v. *Gilligan*, 539 F. 2d 1084 (1976).

We reversed the judgment of the Court of Appeals and ordered the case remanded to the District Court for further proceedings. *Dayton I*, *supra*. In light of the District Court's limited findings regarding liability,[5] we concluded that there was no warrant for imposing a systemwide remedy. Rather, the District Court should have "determine[d] how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that dif-

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[4] To preserve continuity, the court exempted enrolled high school students for two academic years. And the court noted that it would evaluate on a case-by-case basis any deviations from the target percentage. The court, moreover, set down certain guidelines to be followed in achieving the redistribution: (1) students would be permitted to attend neighborhood walk-in schools in those neighborhoods where the schools were already within the approved ratios; (2) students would be transported to the nearest available school; and (3) no student would be transported further than two miles or, if traveling that distance would take more time, for longer than 20 minutes. The District Court appointed a master to supervise the logistics of the plan. Certain other particulars were worked out when the master's report was filed. The plan has now been in effect for three school years.

[5] The three parts of the violation found by the District Court are discussed in n. 3, *supra*. Racial imbalance, we noted in *Dayton I*, is not *per se* a constitutional violation, and rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment. 433 U. S., at 413–414. Thus, the scope of liability extended no further than the use of some optional zones, which apparently had a present effect only as to certain high schools, and the rescission of the resolutions so far as they pertained to these high schools. See *id.*, at 412.

ference, and only if there has been a systemwide impact may there be a systemwide remedy." 433 U. S., at 420. In view of the confusion evidenced at various stages of the proceedings regarding the scope of the violation established, we remanded the case to permit supplementation of the record and specific findings addressed to the scope of the remedy, *id.*, at 418–419, but allowed the existing remedy to remain in effect on remand subject to further orders of the District Court, *id.*, at 420–421.

The District Court held a supplemental evidentiary hearing, undertook to review the entire record anew, and entered findings of fact and conclusions of law and a judgment dismissing the complaint. In support of its judgment, the District Court observed that, although various instances of purposeful segregation in the past evidenced "an inexcusable history of mistreatment of black students," 446 F. Supp., at 1237, plaintiffs had failed to prove that acts of intentional segregation over 20 years old had any current incremental segregative effects.[6] The District Court conceded that the Dayton schools were highly segregated but ruled that the Board's failure to alleviate this condition was not actionable absent sufficient evidence that the racial separation had been caused by the Board's own purposeful discriminatory conduct. In the District Court's eyes, plaintiffs had failed to show either discriminatory purpose or segregative effect, or both, with respect to the challenged practices and policies of the Board, which included faculty hiring and assignments, the use of optional attendance zones and transfer policies, the location and construction of new and expanded school facilities, and

[6] The District Court observed that "[m]any of those practices, if they existed today, would violate the Equal Protection Clause." 446 F. Supp., at 1236. The court identified certain Board policies as being "among" such practices: until at least 1934, black elementary students were kept separate from white students; until approximately 1950, high school athletics were deliberately segregated by race; and until about the same time, black students at one high school were ordered or induced to sit at the rear of classrooms and suffered other indignities.

the rescission of certain prior resolutions recognizing the Board's responsibility to eradicate racial separation in the public schools.[7]

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[7] Reviewing the faculty assignment and hiring practices, the District Court found that until at least 1951 the Board's policies had been intentionally segregative. But in that year the Board instituted a policy of "dynamic gradualism" and "by 1969 all traces of segregation were virtually eliminated." *Id.*, at 1238–1239. Reasoning that the predominant factor in the racial identifiability of schools is the pupil population and not the faculty, the court ruled that plaintiffs had not established that past discrimination in faculty assignments had an incremental segregative effect.

Similarly, the court ruled that the plaintiff children had not shown that the Board's use of attendance zones and transfers denied equal protection. In certain instances, segregative intent had not been satisfactorily demonstrated. In fact, the District Court reversed itself with respect to the high school optional zones it had earlier held unconstitutional. In other instances, current segregative effect had not been proved. Though another high school, Dunbar, had been created and maintained until 1962 as a citywide black high school, the District Court found that because of the increasing black population in that area Dunbar would have been virtually all black by 1960 anyway. And though until the early 1950's black orphans had been bused past nearby white schools to all-black schools, this "arguably" discriminatory conduct had not been shown by "objective proof" to have any continued segregative effect. *Id.*, at 1241.

The court also looked to school construction and siting practices. Although 22 of 24 new schools, 78 of 95 additions, and all 26 portable schools built or utilized by the Board between 1950 and 1972 opened virtually all black or all white, and though many of the accompanying decisions appeared to be so without any rationale as to be "haphazard," the District Court found that the plaintiffs had not shown purposeful segregation. The court also refused to investigate whether the Board had any legitimate grounds for the failure to close some schools and consolidate others when enrollment declined in recent years. Though such a course would have decreased racial separation and saved money, the court found no evidence of discriminatory purpose in those facts. Nor did the court see any hint of impermissible purpose in the Board's decisions in the 1940's to supply school services for legally segregated housing projects and to rent elementary school space in such projects.

Finally, the court held that the Board's rescission of its earlier resolutions was not violative of the Fourteenth Amendment since, in light of

The Court of Appeals reversed. The basic ingredients of the Court of Appeals' judgment were that at the time of *Brown I*, the Dayton Board was operating a dual school system, that it was constitutionally required to disestablish that system and its effects, that it had failed to discharge this duty, and that the consequences of the dual system, together with the intentionally segregative impact of various practices since 1954, were of systemwide import and an appropriate basis for a systemwide remedy. In arriving at these conclusions, the Court of Appeals found that in some instances the findings of the District Court were clearly erroneous and that in other respects the District Court had made errors of law. 583 F. 2d, at 247. Petitioners contend that the District Court, not the Court of Appeals, correctly understood both the facts and the law.

II

A

The Court of Appeals expressly held that, "at the time of *Brown I*, defendants were intentionally operating a dual school system in violation of the Equal Protection Clause of the fourteenth amendment," and that the "finding of the district court to the contrary is clearly erroneous." 583 F. 2d, at 247 (footnote omitted). On the record before us, we perceive no basis for petitioners' challenge to this holding of the Court of Appeals.[8]

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the court's finding that the current segregation had no unconstitutional origin, the Board had no constitutional obligation to adopt the resolutions in the first place.

[8] We have no quarrel with our Brother STEWART's general conclusion that there is great value in appellate courts showing deference to the fact-finding of local trial judges. *Ante*, at 470–471. The clearly-erroneous standard serves that purpose well. But under that standard, the role and duty of the Court of Appeals are clear: it must determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are. The Court of Appeals performed its unavoidable duty in this case and concluded that the District Court had erred.

Concededly, in the early 1950's, "77.6 percent of all students attended schools in which one race accounted for 90 percent or more of the students and 54.3 percent of the black students were assigned to four schools that were 100 percent black." *Id.*, at 248–249. One of these schools was Dunbar High School, which, the District Court found, had been established as a districtwide black high school with an all-black faculty and a black principal, and remained so at the time of *Brown I* and up until 1962. 446 F. Supp., at 1245. The District Court also found that "among" the early and relatively undisputed acts of purposeful segregation was the establishment of Garfield as a black elementary school. *Id.*, at 1236–1237. The Court of Appeals found that two other elementary schools were, through a similar process of optional attendance zones and the creation and maintenance of all-black faculties, intentionally designated and operated as all-black schools in the 1930's, in the 1940's, and at the time of *Brown I*. 583 F. 2d, at 249, 250–251. Additionally, the District Court had specifically found that in 1950 the faculty at 100% black schools was 100% black and that the faculty at all other schools was 100% white. 446 F. Supp., at 1238.

These facts, the Court of Appeals held, made clear that the Board was purposefully operating segregated schools in a substantial part of the district, which warranted an inference and a finding that segregation in other parts of the system was also purposeful absent evidence sufficient to support a finding that the segregative actions "were not taken in effectuation of a policy to create or maintain segregation" or were not among the "factors . . . causing the existing condition of segregation in these schools." *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 214 (1973); see *id.*, at 203; *Columbus Board of Education* v. *Penick*, *ante*, at 467–468. The District Court had therefore ignored the legal significance of the intentional

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Differing with our dissenting Brothers, we see no reason on the record before us to upset the judgment of the Court of Appeals in this respect.

maintenance of a substantial number of black schools in the system at the time of *Brown I*. It had also ignored, contrary to *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 18 (1971), the significance of purposeful segregation in faculty assignments in establishing the existence of a dual school system;[9] here the "purposeful segregation of faculty by race was inextricably tied to racially motivated student assignment practices." 583 F. 2d, at 248. Based on its review of the entire record, the Court of Appeals concluded that the Board had not responded with sufficient evidence to counter the inference that a dual system was in existence in Dayton in 1954. Thus, it concluded that the Board's "intentional seg-

[9] We do not deprecate the relevance of segregated faculty assignments as one of the factors in proving the existence of a school system that is dual for teachers *and* students; but to the extent that the Court of Appeals understood *Swann* v. *Charlotte-Mecklenburg Board of Education* as holding that faculty segregation makes out a prima facie case not only of intentionally discriminatory faculty assignments contrary to the Fourteenth Amendment but also of purposeful racial assignment of students, this is an overreading of *Swann*.

The Court of Appeals also held that the District Court had not given proper weight to *Oliver* v. *Michigan State Board of Education*, 508 F. 2d 178, 182 (CA6 1974), cert. denied, 421 U. S. 963 (1975), where the Court of Appeals had held that "[a] presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation," and that "[t]he presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies." We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants. Of course, as we hold in *Columbus* today, *ante*, at 464–465, proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose, and it may itself show a failure to fulfill the duty to eradicate the consequences of prior purposefully discriminatory conduct. See *supra*, at 535.

regative practices cannot be confined in one distinct area"; they "infected the entire Dayton public school system." *Id.*, at 252.

B

Petitioners next contend that, even if a dual system did exist a quarter of a century ago, the Court of Appeals erred in finding any widespread violations of constitutional duty since that time.

Given intentionally segregated schools in 1954, however, the Court of Appeals was quite right in holding that the Board was thereafter under a continuing duty to eradicate the effects of that system, *Columbus, ante,* at 458, and that the systemwide nature of the violation furnished prima facie proof that current segregation in the Dayton schools was caused at least in part by prior intentionally segregative official acts. Thus, judgment for the plaintiffs was authorized and required absent sufficient countervailing evidence by the defendant school officials. *Keyes, supra,* at 211; *Swann, supra,* at 26. At the time of trial, Dunbar High School and the three black elementary schools, or the schools that succeeded them, remained black schools; and most of the schools in Dayton were virtually one-race schools, as were 80% of the classrooms. " '*Every* school which was 90 percent or more black in 1951–52 *or* 1963–64 *or* 1971–72 and which is still in use today remains 90 percent or more black. Of the 25 white schools in 1972–73, *all* opened 90 percent or more white and, if open, were 90 percent or more white in 1971–72, 1963–64 and 1951–52.' " 583 F. 2d, at 254 (emphasis in original), quoting *Brinkman* v. *Gilligan,* 503 F. 2d 684, 694–695 (CA6 1974). Against this background, the Court of Appeals held that "[t]he evidence of record demonstrates convincingly that defendants have failed to eliminate the continuing systemwide effects of their prior discrimination and have intentionally maintained a segregated school system down to the time the complaint was filed in the present case." 583 F. 2d, at 253. At the very

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least, defendants had failed to come forward with evidence to deny "that the current racial composition of the school population reflects the systemwide impact" of the Board's prior discriminatory conduct. *Id.*, at 258.

Part of the affirmative duty imposed by our cases, as we decided in *Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972), is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects. See also *United States* v. *Scotland Neck Board of Education*, 407 U. S. 484 (1972). The Dayton Board, however, had engaged in many post-*Brown I* actions that had the effect of increasing or perpetuating segregation. The District Court ignored this compounding of the original constitutional breach on the ground that there was no direct evidence of continued discriminatory purpose. But the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system. *Wright*, *supra*, at 460, 462; *Davis* v. *School Comm'rs of Mobile County*, 402 U. S. 33, 37 (1971); see *Washington* v. *Davis*, 426 U. S. 229, 243 (1976). As was clearly established in *Keyes* and *Swann*, the Board had to do more than abandon its prior discriminatory purpose. 413 U. S., at 200–201, n. 11; 402 U. S., at 28. The Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices "are not used and do not serve to perpetuate or re-establish the dual school system," *Columbus*, *ante*, at 460, and the Board has a " 'heavy burden' " of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends. *Wright*, *supra*, at 467, quoting *Green* v. *County School Board*, 391 U. S. 430, 439 (1968).

The Board has never seriously contended that it fulfilled its affirmative duty or the heavy burden of explaining its failure

to do so. Though the Board was often put on notice of the effects of its acts or omissions,[10] the District Court found that "with one [counterproductive] exception . . . no attempt was made to alter the racial characteristics of any of the schools." 446 F. Supp., at 1237. The Court of Appeals held that far from performing its constitutional duty, the Board had engaged in "post-1954 actions which actually have exacerbated the racial separation existing at the time of *Brown I*." 583 F. 2d, at 253. The court reversed as clearly erroneous the District Court's finding that intentional faculty segregation had ended in 1951; the Court of Appeals found that it had effectively continued into the 1970's.[11] This was a systemwide practice and strong evidence that the Board was continuing its efforts to segregate students. Dunbar High School remained as a black high school until 1962, when a new Dunbar High School opened with a virtually all black faculty and student body. The old Dunbar was converted into an ele-

[10] The Board heard from the local National Association for the Advancement of Colored People and other community groups, the Department of Health, Education, and Welfare, the Ohio State Department of Education, and a citizens advisory group the Board had appointed; at times the Board itself expressed its recognition of the problem and of its responsibility, though ultimately it did nothing. 446 F. Supp., at 1251–1252.

[11] Under the policy of "dynamic gradualism" instituted in 1951, see n. 7, *supra*, black teachers were assigned to white or mixed schools when the surrounding communities were ready to accept black teachers, and white teachers who agreed were assigned to black schools. App. 182–Ex. By 1969, each school in the system had at least one black teacher. The District Court apparently did not think the post-1951 policy was purposeful discrimination. 446 F. Supp., at 1238–1239. We think the Court of Appeals was completely justified in finding that conclusion to be clearly erroneous on the undisputed facts. As late as the 1968–1969 school year, the Board assigned 72% of all black teachers to schools that were 90% or more black, and only 9% of white teachers to such schools. And faculty segregation disappeared completely only after efforts of the Department of Health, Education, and Welfare under Title VI of the Civil Rights Act of 1964. See 446 F. Supp., at 1238.

mentary school to which children from two black grade schools were assigned. Furthermore, the Court of Appeals held that since 1954 the Board had used some "optional attendance zones for racially discriminatory purposes in clear violation of the Equal Protection Clause." *Id.*, at 255. The District Court's finding to the contrary was clearly erroneous.[12] At the very least, the use of such zones amounted to a perpetuation of the existing dual school system. Likewise, the Board failed in its duty and perpetuated racial separation in the schools by its pattern of school construction and site selection, recited by the District Court, see n. 7, *supra*, that resulted in 22 of the 24 new schools built between 1950 and the filing of the complaint opening 90% black or white. The same pattern appeared with respect to additions of classroom space made to existing schools. Seventy-eight of a total of 86 additions were made to schools that were 90% of one race. We see no reason to disturb these factual determinations, which conclusively show the breach of duty found by the Court of Appeals.

C

Finally, petitioners contend that the District Court correctly interpreted our earlier decision in this litigation as requiring respondents to prove with respect to each individual act of discrimination precisely what effect it has had on current patterns of segregation.[13] This argument results from a misunderstanding of *Dayton I*, where the violation that had

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[12] The Court of Appeals found that the District Court had committed clear error in reversing its earlier findings of purpose as to certain optional zones, which the Court of Appeals had earlier affirmed and this Court had not set aside. 583 F. 2d, at 255.

[13] Petitioners also contend that the respondent children have failed to establish their standing to bring this action. This challenge is dependent on petitioners' major contentions, for if the Court of Appeals was correct that the current, systemwide segregation is a result of past unlawful conduct then respondents, as students in the system, clearly have standing.

then been established included at most a few high schools. See *Columbus, ante,* at 458 n. 7 and 465–466; nn. 3 and 5, *supra.* We have found no reason to fault the Court of Appeals' findings after our remand that a sufficient case of current, systemwide effect had been established. In reliance on its decision in *Columbus,* the Court of Appeals held:

> "First, the dual school system extant at the time of *Brown I* embraced 'a systemwide program of segregation affecting a substantial portion of the schools, teachers, and facilities' of the Dayton schools, and, thus, clearly had systemwide impact. . . . Secondly, the post-1954 failure of defendants to desegregate the school system in contravention of their affirmative constitutional duty obviously had systemwide impact. . . . The impact of defendants' practices with respect to the assignment of faculty and students, use of optional attendance zones, school construction and site selection, and grade structure and reorganization clearly was systemwide in that the actions perpetuated and increased public school segregation in Dayton." 583 F. 2d, at 258 (footnote omitted), quoting *Keyes,* 413 U. S., at 201.

As we note in *Columbus* today, this is not a misuse of *Keyes,* "where we held that purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a systemwide discriminatory intent unless otherwise rebutted, and that given the purpose to operate a dual school system one could infer a connection between such a purpose and racial separation in other parts of the school system." *Columbus, ante,* at 467–468. See also *Swann,* 402 U. S., at 26. The Court of Appeals was also quite justified in utilizing the Board's total failure to fulfill its affirmative duty—and indeed its conduct resulting in increased segregation—to trace the current, systemwide segregation back to the purposefully dual system of the 1950's and to the subsequent acts of intentional discrimination. See

supra, at 537; *Columbus, ante*, at 464–465; *Keyes, supra*, at 211; *Swann, supra*, at 21, 26–27.

Because the Court of Appeals committed no prejudicial errors of fact or law, the judgment appealed from must be affirmed.

So ordered.

[For dissenting opinion of MR. JUSTICE STEWART, see *ante*, p. 469.]

[For dissenting opinion of MR. JUSTICE POWELL, see *ante*, p. 479.]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

For the reasons set out in my dissent in *Columbus Board of Education* v. *Penick, ante*, p. 489, I cannot join the Court's opinion in this case. Both the Court of Appeals for the Sixth Circuit and this Court used their respective *Columbus* opinions as a roadmap, and for the reasons I could not subscribe to the affirmative duty, the foreseeability test, the cavalier treatment of causality, and the false hope of *Keyes* and *Swann* rebuttal in *Columbus*, I cannot subscribe to them here. Little would be gained by another "blow-by-blow" recitation in dissent of how the Court's cascade of presumptions in this case sweeps away the distinction between *de facto* and *de jure* segregation.

In its haste to affirm the Court of Appeals, the Court barely breaks stride to note that there was some "overreading of *Swann*" in the Court of Appeals' conclusion that there was a "dual" school system at the time of *Brown I*, and that the court had the wrong conception of segregative intent, *i. e.*, the mysterious *Oliver* standard which this Court thinks the Court of Appeals talks a lot about but never really applies. *Ante*, at 536 n. 9. But as the Court more candidly recognizes in this case, the affirmative duty renders any discussion of segrega-

tive intent after 1954 gratuitous anyway. The Court is also more honest about the stringency of the standard by which all post-1954 conduct is to be judged: "[T]he Board has a '"heavy burden"' of showing that actions that increased or continued the effects of the dual [school] system serve *important* and legitimate ends." *Ante,* at 538 (emphasis added).

I think that the *Columbus* and *Dayton* District Court opinions point out the limitation of my Brother STEWART's perception of the proper roles of the trial judge and reviewing courts. That this and other appellate courts must defer to the factfindings of trial courts is unexceptionable. With the aid of this observation, he concludes that the Court of Appeals should be affirmed in *Columbus,* insofar as it agreed with the District Court there, and should be reversed here because it upset the District Court's conclusion that there was no warrant for a desegregation remedy. But even a casual reading of the District Court opinions makes it very clear that the primary determinants of the different results in these two cases were two totally different conceptions of the law and methodology that govern school desegregation litigation. The District Judge in *Dayton* did not employ a post-1954 "affirmative duty" test. Violations he did identify were found not to have any causal relationship to existing conditions of segregation in the Dayton school system. He did not employ a foreseeability test for intent, hold the school system responsible for residential segregation, or impugn the neighborhood school policy as an explanation for some existing one-race schools. In short, the *Dayton* and *Columbus* District Judges had completely different ideas of what the law required. As I am sure my Brother STEWART agrees, it *is* for reviewing courts to make those requirements clear.

Thus, the District Court opinions in these two cases demonstrate dramatically the hazards presented by the laissez-faire theory of appellate review in school desegregation cases. And

I have no doubt that the Court of Appeals' heavyhanded approach in this case is to some degree explained by the perceived inequity of imposing a systemwide racial-balance remedy on Columbus while finding no violation in Dayton.* The simple meting out of equal remedies, however, is not by any means "equal justice under law."

*The Court of Appeals did not even remand to allow the Dayton school authorities the opportunity to show that a more limited remedy was warranted, even though the Court of Appeals made findings of fact with respect to liability that had never been made before by any court in this long litigation, and therefore were never part of a remedy hearing. This doubtlessly reflects the Court of Appeals' honest appraisal of the futility of attempts at *Swann* rebuttal by the school board.

Syllabus

ROSE, WARDEN *v.* MITCHELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 77–1701. Argued January 16, 1979—Decided July 2, 1979

Respondents, who are Negroes, were indicted by a county grand jury in Tennessee for murder. They filed a plea in abatement seeking dismissal of the indictment on the ground, *inter alia*, that the foreman of the grand jury had been selected in a racially discriminatory fashion. At a hearing on this plea, respondents called as witnesses 3 jury commissioners who testified only as to the selection of the grand jury venire; 2 former foremen who testified that they had never known of a Negro foreman but were not questioned as to how long they had resided in the county; the current foreman who stated he had no knowledge as to whether any Negro had ever served; and 11 of the 12 grand jurors (other than the foreman) who served when respondents were indicted, none of whom testified relative to selection of the foreman or the race of past foremen. The trial court denied the plea. Subsequently, respondents were convicted, and the Tennessee Court of Criminal Appeals affirmed. Respondents then filed a habeas corpus petition in Federal District Court, which dismissed the petition, finding that respondents' prima facie case of discrimination in selecting the grand jury foreman was rebutted by the State. The Court of Appeals reversed.

Held:

1. Claims of racial discrimination in the selection of members of a state grand jury are cognizable in federal habeas corpus and will support issuance of a writ setting aside a conviction and ordering the indictment quashed, notwithstanding that no constitutional impropriety tainted the selection of the petit jury and guilt was established beyond a reasonable doubt at a trial free from constitutional error. Pp. 550–564.

(a) Because discrimination on the basis of race in the selection of members of a grand jury strikes at fundamental values of our judicial system and our society as a whole, a criminal defendant's right to equal protection of the laws is denied when he is indicted by a grand jury from which members of a racial group have been purposefully excluded. Pp. 551–557.

(b) Such costs as exist in permitting a federal court to hear claims of racial discrimination in the selection of a grand jury when reviewing

a state conviction, are outweighed by the recognized policy of combatting racial discrimination in the administration of justice. Even though there are alternative remedies to vindicate the rights of those members of the class denied the chance to serve on grand juries, the fact is that permitting challenges to unconstitutional state action by defendants has been, and is, the main avenue by which Fourteenth Amendment rights are vindicated in this context. Pp. 557–559.

(c) The rationale of *Stone* v. *Powell*, 428 U. S. 465, in which it was held that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim at trial and on direct review, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial, will not be extended to a claim of discrimination in the selection of the grand jury that indicts the habeas petitioner. This latter claim differs fundamentally from application on habeas of the Fourth Amendment exclusionary rule. Such a claim concerns allegations that the trial court itself violated the Fourteenth Amendment in the operation of the grand jury system, whereas in Fourth Amendment cases, courts are called upon to evaluate the actions of the police in seizing evidence. Moreover, a claim of grand jury discrimination involves charges that state officials are violating the direct command of the Equal Protection Clause of the Fourteenth Amendment, and federal statutes passed thereunder, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Federal habeas review is necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by the very state judges who operate that system. Pp. 559–564.

2. As a matter of law, respondents failed to make out a prima facie case of discrimination in violation of the Equal Protection Clause with regard to the selection of the grand jury foreman. Respondents' case rested entirely on the testimony of the two former foremen and the current foreman, since they were the only ones who testified at all about the selection of a foreman, and their testimony was insufficient to establish respondents' case. Absent evidence as to the total number of foremen appointed by the judges in the county during the critical period of time, it is difficult to say that the number of Negroes appointed foreman, even if zero, is statistically so significant as to make out a case of discrimination under the "rule of exclusion." Pp. 564–574.

570 F. 2d 129, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN and MARSHALL, JJ., joined; in Parts I, III, and IV of which BURGER, C. J., and REHNQUIST, J., joined; and in Parts I and II of which WHITE and STEVENS, JJ., joined. REHNQUIST, J., filed a statement concurring in part, *post*, p. 574. STEWART, J., *post*, p. 574, and POWELL, J., *post*, p. 579, filed opinions concurring in the judgment, in which REHNQUIST, J., joined. WHITE, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 588. STEVENS, J., filed an opinion dissenting in part, *post*, p. 593.

William M. Leech, Jr., Attorney General of Tennessee, argued the cause for petitioner. With him on the brief was *Michael E. Terry*, Assistant Attorney General.

Walter Kurtz argued the cause and filed a brief for respondents.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.†

In this federal habeas corpus case, respondents claim they were the victims of racial discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment, in the selection of the foreman of the Tennessee grand jury that indicted them for murders in the first degree. As the case comes to this Court, no issue of discrimination in the selection of the venire is presented; we are concerned only with the selection of the foreman.

I

In November 1972, respondents James E. Mitchell and James Nichols, Jr., and two other men were jointly indicted by the grand jury of Tipton County, Tenn. The four were charged in two counts of first-degree murder in connection with the shooting deaths of patrons during the robbery of

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**Solicitor General McCree, Assistant Attorney General Days, Walter W. Barnett*, and *Mildred M. Matesich* filed a memorandum for the United States as *amicus curiae* urging affirmance.

†MR. CHIEF JUSTICE BURGER and MR. JUSTICE REHNQUIST join only Parts I, III, and IV of the opinion, and MR. JUSTICE WHITE and MR. JUSTICE STEVENS join only Parts I and II.

a place known as White's Cafe.[1] Prior to trial, respondents filed with the trial court a written *pro se* motion in the nature of a plea in abatement. App. 1. They sought thereby, together with other relief, the dismissal of the indictment on the grounds that the grand jury array, and the foreman, had been selected in a racially discriminatory fashion.[2] Each respondent is a Negro.

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[1] The Constitution of Tennessee requires that any prosecution for the crimes with which respondents were charged be instituted by presentment or indictment by a grand jury. Tenn. Const., Art. I, § 14.

[2] In Tennessee, the grand jury is composed of 12 grand jurors, Tenn. Code Ann. § 40–1501 (1975), and a foreman or forewoman who "shall be the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof." § 40–1506 (Supp. 1978). The foreman or forewoman is appointed for a term of two years by the judge of the court having criminal jurisdiction in the county. *Ibid.* There is no limitation on reappointment. The foreman or forewoman must be at least 25 years of age, "shall be a good and lawful man or woman," and possess all the other qualifications required of Tennessee jurors. § 40–1507 (Supp. 1978). See § 22–101 (Supp. 1978).

The members of the grand jury, other than the foreman or forewoman, are selected through the operation of the "key man" system, whereby three jury commissioners compile a list of qualified potential jurors from which the grand jurors are selected at random. See §§ 22–223 to 22–228 (Supp. 1978); §§ 40–1501 and 40–1502 (1975). Twelve members of the grand jury must concur in order to return an indictment. § 40–1706 (1975). The foreman or forewoman may be 1 of the 12. *Bolen* v. *State*, 554 S. W. 2d 918, 920 (Tenn. Crim. App. 1976). The foreman or forewoman acts as chairman or "presiding officer." *State* v. *Collins*, 65 Tenn. 151, 153 (1873). He or she is charged with the duty of assisting the district attorney in investigating crime, may order the issuance of subpoenas for witnesses before the grand jury, may administer oaths to grand jury witnesses, must endorse every bill returned by the grand jury, and must present any indictment to the court in the presence of the grand jury. Tenn. Code Ann. §§ 40–1510, 40–1622, 40–1706, and 40–1709 (1975 and Supp. 1978). The absence of the foreman's endorsement makes an indictment "fatally defective." *Bird* v. *State*, 103 Tenn. 343, 344, 52 S. W. 1076 (1899).

The court appointed counsel to represent respondents and in due course conducted an evidentiary hearing on the plea in abatement. At that hearing, testimony on behalf of the respondents was taken from the 3 Tipton County jury commissioners; from 2 former Tipton County grand jury foremen; from the foreman of the grand jury serving at the time respondents were indicted; and from 11 of the 12 other members of that grand jury. The court clerk was a witness on behalf of the State. *Id.*, at 3–35.

At the close of this evidence, the court denied the plea in abatement, first orally, and then by written order, without comment. *Id.*, at 35 and 36.

Respondents were then tried jointly to a jury. A verdict of guilty of first-degree murder on each count was returned. Respondents received sentences of 60 years on each count, the sentences to run consecutively with credit allowed for time spent in jail awaiting trial.

On appeal, the Court of Criminal Appeals of Tennessee affirmed the convictions, finding, with respect to an assignment of error relating to the plea in abatement, that the "facts here do not demonstrate a systematic exclusion of Negroes upon racial grounds." *Id.*, at 38–39. The Supreme Court of Tennessee denied certiorari. *Id.*, at 42.

Respondents each then filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the Western District of Tennessee, *id.*, at 43–52, 62–73, renewing, among other things, the allegation of discrimination in the selection of the Tipton County grand jury and its foreman. The District Court referred the petitions to a magistrate who, after reviewing the evidence introduced in the state court at the hearing on the plea in abatement and studying the method of selection, recommended that the court hold an evidentiary hearing on the grand jury and jury foreman selection issues. Specifically, the magistrate concluded that respondents had presented an unrebutted prima facie case

with respect to the selection of the foreman. *Id.*, at 84, 90, 97. The District Court disagreed with the magistrate as to the grand jury, and concluded that the state judge had ruled correctly on that issue. On the foreman question, the District Court went along with the magistrate, and ordered the State to make further response. *Id.*, at 98. The State then submitted affidavits from the acting foreman of the grand jury that indicted respondents and from the state trial judge who appointed the foreman. *Id.*, at 102–106, 108–113. On the basis of these affidavits, the petitions were ordered dismissed. *Id.*, at 121–122.

The District Judge, however, granted the certificate of probable cause required by Fed. Rule App. Proc. 22 (b), App. 126–127, and respondents appealed to the United States Court of Appeals for the Sixth Circuit.

The Court of Appeals reversed. 570 F. 2d 129 (1978). That court deemed it unnecessary to resolve respondents' contentions concerning discrimination in the selection of the grand jury venire, *id.*, at 134, since it found sufficient grounds to reverse with respect to the selection of the foreman. It remanded the case with instructions for the entry of an order that respondents' murder convictions be set aside and that respondents be reindicted within 60 days or be released. *Id.*, at 137.

We granted certiorari to consider the foreman issue. 439 U. S. 816 (1978).

II

We initially address two arguments that, aside from the specific facts of this particular case, go to the question whether a federal court, as a matter of policy, should hear claims of racial discrimination in the selection of a grand jury when reviewing a state conviction. First, we consider whether claims of grand jury discrimination should be considered harmless error when raised, on direct review or in a habeas corpus proceeding, by a defendant who has been found guilty beyond a

reasonable doubt by a properly constituted petit jury at a trial on the merits that was free from other constitutional error. Second, we consider the related question whether such claims should be cognizable any longer on federal habeas corpus in light of the decision in *Stone* v. *Powell*, 428 U. S. 465 (1976).

A

For nearly a century, this Court in an unbroken line of cases has held that "a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race." *Alexander* v. *Louisiana*, 405 U. S. 625, 628 (1972); *Bush* v. *Kentucky*, 107 U. S. 110, 119 (1883); *Neal* v. *Delaware*, 103 U. S. 370, 394 (1881). See *Castaneda* v. *Partida*, 430 U. S. 482, 492–495, and n. 12 (1977).[3] A criminal defendant "is entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice." *Alexander* v. *Louisiana*, 405 U. S., at 628–629. Accordingly, where sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed. *E. g.*, *Hill* v. *Texas*, 316 U. S. 400, 406 (1942).[4]

[3] In *Castaneda* v. *Partida*, we noted that among the cases in which the Court had applied this principle in circumstances involving grand jury discrimination were *Bush* v. *Kentucky*; *Carter* v. *Texas*, 177 U. S. 442 (1900); *Rogers* v. *Alabama*, 192 U. S. 226 (1904); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964); and *Alexander* v. *Louisiana*.

[4] In view of the disposition of this case on the merits, we may assume

Until today, only one Justice among those who have served on this Court in the 100 years since *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), has departed from this line of decisions. In his dissent in *Cassell* v. *Texas*, 339 U. S. 282, 298 (1950), Mr. Justice Jackson voiced this lone objection by arguing that federal courts should not set aside criminal convictions solely on the ground that discrimination occurred in the selection of the grand jury, so long as no constitutional impropriety tainted the selection of the petit jury, and guilt was established beyond a reasonable doubt at a trial free from constitutional error. The *Cassell* dissent noted that discrimination in the selection of the grand jury had nothing to do with the fairness of the trial or the guilt or innocence of the defendant, and that reversal based on such discrimination conflicted "with another principle important to our law, *viz.*, that no conviction should be set aside for errors not affecting substantial rights of the accused." *Id.*, at 299.

Mr. Justice Jackson could discern no reason to permit this conflict. In the first place, he noted, the convicted defendant suffered no possible prejudice. Unlike the petit jury, the grand jury sat only to determine probable cause to hold the defendant for trial. It did not consider the ultimate issue of guilt or innocence. Once a trial court heard all the evidence and determined it was sufficient to submit the case to the trier of fact, and once that trier determined that the defendant was guilty beyond a reasonable doubt, Mr. Justice Jackson believed that it "hardly lies in the mouth of a defendant . . . to say that his indictment is attributable to prejudice." *Id.*, at 302. "Under such circumstances," he concluded, "it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict." *Ibid.*

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without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire. See *Carter* v. *Jury Comm'n*, 396 U. S. 320, 338 (1970).

Nor did Mr. Justice Jackson believe the *Strauder* line of cases to be justified by a need to enforce the rights of those discriminated against to sit on grand juries without regard to their race. He pointed out that Congress had made it a crime to discriminate in this manner, 18 U. S. C. § 243,[5] and that civil remedies at law and equity were available to members of the class discriminated against. Accordingly, Mr. Justice Jackson would have held that "discrimination in selection of the grand jury . . . , however great the wrong toward qualified Negroes of the community, was harmless to this defendant," 339 U. S., at 304, and would have left enforcement of Fourteenth Amendment interests to criminal prosecutions under § 243 and civil actions instituted by such "qualified Negroes."

This position for the first time has attracted the support of additional Members of the Court, as expressed in the separate opinion of MR. JUSTICE STEWART in this case. Echoing the *Cassell* dissent, this separate opinion asserts that "the time has come to acknowledge that Mr. Justice Jackson's [position] is unanswerable, and to hold that a defendant may not rely on a claim of grand jury discrimination to overturn an otherwise valid conviction." *Post,* at 575. It argues that the conviction of the defendant should be a break in the chain of events that preceded it, and notes that where Fourth or Fifth Amendment rights are violated, the evidence illegally obtained is suppressed, but "the prosecution is not barred altogether." *Post,* at 576–577, n. 4. The separate opinion be-

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[5] Title 18 U. S. C. § 243 provides:

"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

lieves that any other interests that are harmed by grand jury discrimination may be protected adequately by prosecutions, civil actions, or pretrial remedies available to defendants. In such circumstances, it finds the heavy social cost entailed in a reversal unjustified, especially in light of the fact the defendant himself has suffered no prejudice. Accordingly, the separate opinion would not recognize, either on direct review or on an application for a writ of habeas corpus, a claim of grand jury discrimination as a valid ground for setting aside a criminal conviction.[6]

This Court, of course, consistently has rejected this argument. It has done so implicitly in those cases in which it has reaffirmed the *Strauder* principle in the context of grand jury discrimination. *E. g., Reece* v. *Georgia,* 350 U. S. 85, 87 (1955); *Alexander* v. *Louisiana,* 405 U. S., at 628. And it has done so expressly, where the argument was pressed in the guise of the claim that the constitutional rights of the defendant are not violated by grand jury discrimination since an indictment only brings that defendant before the petit jury for trial. *Pierre* v. *Louisiana,* 306 U. S. 354, 356–358 (1939). See *Cassell* v. *Texas,* 339 U. S., at 290 (Frankfurter, J., concurring); *id.,* at 296 (Clark, J., concurring). We decline now to depart from this longstanding consistent practice, and we adhere to the Court's previous decisions.

Discrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States, including the Fourteenth Amendment, were aimed. The Equal Protection Clause was central to the Fourteenth Amendment's prohibition of discriminatory action by the

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[6] The State makes a variation of this argument by contending that any constitutional error that occurred in the selection of the foreman of the grand jury is "now moot procedural error which had no effect on the integrity of the trial," Brief for Petitioner 29, and so was harmless beyond a reasonable doubt in light of the subsequent conviction by a properly constituted petit jury.

State: it banned most types of purposeful discrimination by the State on the basis of race in an attempt to lift the burdens placed on Negroes by our society. It is clear from the earliest cases applying the Equal Protection Clause in the context of racial discrimination in the selection of a grand jury, that the Court from the first was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate, and with the fundamental social values the Fourteenth Amendment was adopted to protect, even though it addressed the issue in the context of reviewing an individual criminal conviction. Thus, in the first case establishing the principles that have guided the Court's decisions these 100 years, the Court framed the issue in terms of the larger concerns with racial discrimination in general that it understood as being at the core of the Fourteenth Amendment:

> "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. . . . [T]he apprehension that through prejudice [such persons] might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws." *Strauder* v. *West Virginia,* 100 U. S., at 308, 309.

Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and

thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Smith* v. *Texas,* 311 U. S. 128, 130 (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States,* 329 U. S. 187, 195 (1946).

Because discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole, the Court has recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded. *E. g., Neal* v. *Delaware,* 103 U. S., at 394; *Reece* v. *Georgia,* 350 U. S., at 87. For this same reason, the Court also has reversed the conviction and ordered the indictment quashed in such cases without inquiry into whether the defendant was prejudiced in fact by the discrimination at the grand jury stage. Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, " '[t]he court will correct the wrong, will quash the indictment[,] or the panel[;] or, if not, the error will be corrected in a superior court,' and ultimately in this court upon review," and all without regard to prejudice. *Neal* v. *Delaware,* 103 U. S., at 394, quoting *Virginia* v. *Rives,* 100 U. S. 313, 322 (1880). See *Bush* v. *Ken-*

tucky, 107 U. S., at 119. The Court in *Hill* v. *Texas*, 316 U. S., at 406, stated:

> "[N]o State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. *Tumey* v. *Ohio*, 273 U. S. 510, 535. It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained. Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous." [7]

We do not deny that there are costs associated with this approach. But the remedy here is in many ways less drastic than in situations where other constitutional rights have been violated. In the case of a Fourth or Fifth Amendment violation, the violation often results in the suppression of evidence that is highly probative on the issue of guilt. Here,

[7] The fact that there is no constitutional requirement that States institute prosecutions by means of an indictment returned by a grand jury, see *Hurtado* v. *California*, 110 U. S. 516 (1884), does not relieve those States that do employ grand juries from complying with the commands of the Fourteenth Amendment in the operation of those juries.

however, reversal does not render a defendant "immune from prosecution," nor is a subsequent reindictment and reprosecution "barred altogether," as MR. JUSTICE STEWART's opinion suggests. *Post*, at 576–577, n. 4. "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for [the State] may indict and try him again by the procedure which conforms to constitutional requirements." *Hill* v. *Texas*, 316 U. S., at 406. And in that subsequent prosecution, the State remains free to use all the proof it introduced to obtain the conviction in the first trial.

In any event, we believe such costs as do exist are outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice. And regardless of the fact that alternative remedies remain to vindicate the rights of those members of the class denied the chance to serve on grand juries, the fact is that permitting challenges to unconstitutional state action by defendants has been, and is, the main avenue by which Fourteenth Amendment rights are vindicated in this context. Prosecutions under 18 U. S. C. § 243 have been rare, and they are not under the control of the class members and the courts. Civil actions, expensive to maintain and lengthy, have not often been used. And even assuming that some type of pretrial procedure would be open to a defendant, *e. g.*, petitioning for a writ of habeas corpus in federal court, under such a procedure the vindication of federal constitutional rights would turn on a race to obtain a writ before the State could commence the trial.

We think the better view is to leave open the route that over time has been the main one by which Fourteenth Amendment rights in the context of grand jury discrimination have been vindicated. For we also cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our

society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious. We therefore decline "to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice," *Cassell* v. *Texas*, 339 U. S., at 290 (Frankfurter, J., concurring), and we adhere to our position that discrimination in the selection of the grand jury remains a valid ground for setting aside a criminal conviction.[8]

B

The State makes the additional argument that the decision in *Stone* v. *Powell*, 428 U. S. 465 (1976), should be extended so as to foreclose a grant of federal habeas corpus relief to a state prisoner on the ground of discrimination in the selection of the grand jury. MR. JUSTICE POWELL, dissenting in *Castaneda* v. *Partida*, 430 U. S., at 508 n. 1, joined by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, and at least inferentially by MR. JUSTICE STEWART, *id.*, at 507, specifically observed that a "strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after *Stone* v. *Powell*." In this connection, MR. JUSTICE POWELL noted that a claim by a convicted prisoner of grand jury discrimination goes only to the "moot determination by the grand jury that there was sufficient cause to proceed to trial [and not to any] flaw in the trial itself." *Id.*, at 508 n. 1. He concluded that, as in *Stone*, "the incremental benefit of extending habeas corpus as a means of correcting unconstitutional grand jury selection procedures might be viewed as 'outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.'" 430 U. S., at 508 n. 1, quoting *Stone*, 428 U. S., at 494.

[8] There is no contention in this case that respondents sought to press their challenge to the grand jury without complying with state procedural rules as to when such claims may be raised. See *Francis* v. *Henderson*, 425 U. S. 536 (1976). Nor do they seek to press this challenge after pleading guilty. See *Tollett* v. *Henderson*, 411 U. S. 258 (1973).

The State echoes these arguments. It contends that habeas corpus relief should be granted only where the error alleged in support of that relief affected the determination of guilt. In this case, as in *Stone* v. *Powell*, it argues, no error affected the trial on the merits. Moreover, only a relatively minor error, involving the nonvoting foreman of the grand jury and not the entire venire, is at issue. Accordingly, following its interpretation of *Stone*, the State contends that the benefits derived from extending habeas relief in this case are outweighed by the costs associated with reversing a state conviction entered upon a finding of guilt beyond a reasonable doubt at a trial free from constitutional error.[9]

In *Stone* v. *Powell*, however, the Court carefully limited the reach of its opinion. It stressed that its decision to limit review was "*not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." 428 U. S., at 495 n. 37 (emphasis in original). Rather, the Court made it clear that it was confining its ruling to cases involving the judicially created exclusionary rule, which had minimal utility when applied in a habeas corpus proceeding. "In sum," the Court concluded, it was holding "only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review." *Ibid.*

Mindful of this limited reach of *Stone*, we conclude that a claim of discrimination in the selection of the grand jury differs so fundamentally from application on habeas of the

[9] The *Stone* v. *Powell* issue was raised by petition for rehearing in the Court of Appeals. App. 142. In denying that petition, the court stated "that the issues raised therein were fully considered upon the original submission and decision of this case." *Id.*, at 151. In its opinion denying respondents' motion for amendment of judgment, the District Court found that its original ruling denying the writ was bolstered by the decision in *Stone*. App. 125.

Fourth Amendment exclusionary rule that the reasoning of *Stone* v. *Powell* should not be extended to foreclose habeas review of such claims in federal court.

In the first place, claims such as those pressed by respondents in this case concern allegations that the trial court itself violated the Fourteenth Amendment in the operation of the grand jury system. In most such cases, as in this one, this same trial court will be the court that initially must decide the merits of such a claim, finding facts and applying the law to those facts. This leads us to doubt that claims that the operation of the grand jury system violates the Fourteenth Amendment in general will receive the type of full and fair hearing deemed essential to the holding of *Stone*. See, *e. g.*, 428 U. S., at 494, 495 n. 37. In Fourth Amendment cases, courts are called upon to evaluate the actions of the police in seizing evidence, and this Court believed that state courts were as capable of performing this task as federal habeas courts. *Id.*, at 493–494, n. 35. But claims that the state judiciary itself has purposely violated the Equal Protection Clause are different. There is a need in such cases to ensure that an independent means of obtaining review by a federal court is available on a broader basis than review only by this Court will permit. A federal forum must be available if a full and fair hearing of such claims is to be had.

Beyond this, there are fundamental differences between the claim here at issue and the claim at issue in *Stone* v. *Powell*. Allegations of grand jury discrimination involve charges that state officials are violating the direct command of the Fourteenth Amendment, and federal statutes passed under that Amendment, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Since the first days after adoption of the Amendment, the Court has recognized that by its direct operation the Equal Protection Clause forbids the States to discriminate in the selection of members of a grand jury. This contrasts with

the situation in *Stone*, where the Court considered application of "a judicially created remedy rather than a personal constitutional right." 428 U. S., at 495 n. 37. Indeed, whereas the Fourteenth Amendment by its terms always has been directly applicable to the States, the Fourth Amendment and its attendant exclusionary rule only recently have been applied fully to the States.

In this context, the federalism concerns that motivated the Court to adopt the rule of *Stone* v. *Powell* are not present. Federal courts have granted relief to state prisoners upon proof of the proscribed discrimination for nearly a century. See, *e. g.*, *Virginia* v. *Rives*, 100 U. S., at 322. The confirmation that habeas corpus remains an appropriate vehicle by which federal courts are to exercise their Fourteenth Amendment responsibilities is not likely further to increase "'friction between our federal and state systems of justice, [or impair] the maintenance of the constitutional balance upon which the doctrine of federalism is founded.'" *Stone* v. *Powell*, 428 U. S., at 491 n. 31, quoting *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 259 (1973) (POWELL, J., concurring).

Further, *Stone* rested to a large extent on the Court's perception that the exclusionary rule is of minimal value when applied in a federal habeas proceeding. The Court there found that the deterrent value of the exclusionary rule was not enhanced by the possibility that a "conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant." 428 U. S., at 493. Nor did the Court believe that the "overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions." *Ibid.* And it could not find any basis to say that federal review would reveal flaws in the search or seizure that had gone undetected at trial or on appeal. *Ibid.* In these circumstances, the Court concluded

that the benefits of applying the Fourth Amendment exclusionary rule on federal habeas did not outweigh the costs associated with it.

None of this reasoning has force here. Federal habeas review is necessary to ensure that constitutional defects in the state judiciary's grand jury selection procedure are not overlooked by the very state judges who operate that system. There is strong reason to believe that federal review would indeed reveal flaws not appreciated by state judges perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective. The educative and deterrent effect of federal review is likely to be great, since the state officials who operate the system, judges or employees of the judiciary, may be expected to take note of a federal court's determination that their procedures are unconstitutional and must be changed.

We note also that *Stone* rested to an extent on the Court's feeling that state courts were as capable of adjudicating Fourth Amendment claims as were federal courts. But where the allegation is that the state judiciary itself engages in discrimination in violation of the Fourteenth Amendment, there is a need to preserve independent federal habeas review of the allegation that federal rights have been transgressed. As noted above, in this case, the very judge whose conduct respondents challenged decided the validity of that challenge.

It is also true that the concern with judicial integrity, deprecated by the Court in *Stone* in the context of habeas review of exclusionary rule issues, is of much greater concern in grand jury discrimination cases. The claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question. The force of this justification for extending federal habeas review cannot be said to be minimal where allegations of improper judicial conduct are made.

As pointed out in our discussion of the *Cassell* dissent, it

is tempting to exaggerate the costs associated with quashing an indictment returned by an improperly constituted grand jury. In fact, the costs associated with quashing an indictment are significantly less than those associated with suppressing evidence. Evidence suppressed under the Fourth Amendment may not be used by the State in any new trial, though it be highly probative on the issue of guilt. In contrast, after a federal court quashes an indictment, the State remains free to use at a second trial any and all evidence it employed at the first proceeding. A prisoner who is guilty in fact is less likely to go free, therefore, than in cases involving the exclusionary rule. *Hill* v. *Texas*, 316 U. S., at 406. Providing federal habeas corpus relief is, as a consequence, less of an intrusion on the State's system of criminal justice than was the case in *Stone*.

Finally, we note that the constitutional interests that a federal court adjudicating a claim on habeas of grand jury discrimination seeks to vindicate are substantially more compelling than those at issue in *Stone*. As noted above, discrimination on account of race in the administration of justice strikes at the core concerns of the Fourteenth Amendment and at fundamental values of our society and our legal system. Where discrimination that is "at war with our basic concepts of a democratic society and a representative government," *Smith* v. *Texas*, 311 U. S., at 130, infects the legal system, the strong interest in making available federal habeas corpus relief outweighs the costs associated with such relief.

We therefore decline to extend the rationale of *Stone* v. *Powell* to a claim of discrimination in the selection of the grand jury that indicts the habeas petitioner. And we hold that federal habeas corpus relief remains available to provide a federal forum for such claims.

III

Notwithstanding these holdings that claims of discrimination in the selection of members of the grand jury are cogniza-

ble on federal habeas corpus, and will support issuance of a writ setting aside a state conviction and ordering the indictment quashed, it remains true that to be entitled to habeas relief the present respondents were required to prove discrimination under the standards set out in this Court's cases. That is, "in order to show that an equal protection violation has occurred in the context of grand jury [foreman] selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda* v. *Partida,* 430 U. S., at 494. Specifically, respondents were required to prove their prima facie case with regard to the foreman as follows:

> "The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foreman], over a significant period of time. . . . This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." *Ibid.*

Only if respondents established a prima facie case of discrimination in the selection of the foreman in accord with this approach, did the burden shift to the State to rebut that prima facie case. *Id.,* at 495.

There is no question, of course, that respondents, as Negroes, are members of a group recognizable as a distinct class capable of being singled out for different treatment under the laws. *Id.,* at 494; *Hernandez* v. *Texas,* 347 U. S. 475,

478–479 (1954). And one may assume for purposes of this case that the Tennessee method of selecting a grand jury foreman is susceptible of abuse. Accordingly, we turn to a consideration of the evidence offered by respondents in their attempt to prove sufficient underrepresentation to make out a prima facie case.

Respondents' case at the hearing on the plea in abatement consisted in its entirety of the following:

Respondents first called as witnesses the three Tipton County jury commissioners. These commissioners, all white, testified only as to the selection of the grand jury venire. In view of the Tennessee method of foreman selection, n. 2, *supra*, they did not testify, and could hardly be expected to have testified, as to the method of selection of foremen; neither did any of them refer to the race of any past foremen.

Respondents next called two former foremen and the current foreman of the Tipton County grand jury. The first, Frank McBride, testified that he was a lifelong resident of the county, but there was no evidence as to his age and thus as to the years he lived in the county. McBride stated that he had served as foreman, "ten or twelve years ago . . . for five or six years . . . and then about two or three times since then, just for one session of Court." App. 17. In answer to respondents' inquiry whether he had "ever known of any foreman that was a black man," McBride said "No, sir." *Id.*, at 18. The second past foreman, Peyton J. Smith, stated that he had resided in Tipton County all his life but, again, no inquiry was made to as to how long that had been. Smith testified that he had served as foreman "for several years back in the early '50's, and . . . several times since then on occasion of the illness of the foreman at that time." *Id.*, at 20. Like McBride, Smith answered "No" when asked whether he had ever known of a Negro foreman. *Ibid.* Jimmy Naifeh, the current foreman, testified that he had served for approximately two years and that he did not know "if there was or if there wasn't" ever a Negro foreman of the county

grand jury. *Id.*, at 25. No inquiry was made of Naifeh as to the length of time he had lived in the county.

Respondents then called 11 of the 12 grand jurors[10] (other than the foreman) who were serving when respondents were indicted. Not one testified relative to the selection of the foreman or the race of past foremen. Their testimony, individually and collectively, was to the effect that one among their number was a Negro; that they had heard only one witness, a deputy sheriff, on respondents' case; that no one voiced any prejudice or hostility toward respondents because of their race; and that there was no consideration of the fact that respondents were Negroes. Indeed, when some were asked whether they knew whether respondents were Negroes, they answered in the negative. *Id.*, at 26–32.

This was *all* the evidence respondents presented in support of their case. In rebuttal, the State called only the clerk of the trial court. He was asked no question relating to grand jury foremen, and respondents made no inquiry of him on cross-examination on that or on any other topic. *Id.*, at 34–35.

Two additional facts were stressed by the State at the later federal habeas proceeding. The first was the recruitment, at the 1972 term, of temporary (and former) foreman Smith in place of regular foreman Naifeh. Smith had testified at the hearing on the plea in abatement that Naifeh "could not be here and I was asked to come and appear before this Court and the judge asked me to serve." *Id.*, at 21. The State argued that Smith had been selected only because the judge believed Smith, in view of his experience, would be a capable temporary replacement for the regular foreman. This proper motive, the State said, negated any claim that racial discrimination played a role in the selection of Smith to be

[10] The record indicates that one grand juror was in Florida at the time of the hearing. App. 27.

temporary foreman. The second fact was that the temporary foreman did not vote on the indictment returned against respondents, see *id.*, at 105; this was because the other 12 had all voted to indict and the temporary foreman's vote therefore was unnecessary. Thus, the State argued, any possible error in the selection of the foreman was harmless and of no consequence to respondents.

In support of its argument to the federal habeas court, the State submitted the affidavit of the judge who had selected the temporary foreman and the permanent foreman, and who had presided at the hearing on the plea in abatement as well as at respondents' trial. The judge, who had served since 1966, *id.*, at 5, a period of seven years, stated that Naifeh "was unable to serve because he was going to be out of the County at the November 1972 term." *Id.*, at 112. The judge went on to say that he had appointed Smith temporary foreman because Smith had had experience "and does a good job as such foreman." The affidavit concluded:

> "In my five counties, I do not have a black grand jury foreman, although I have a black member of my Jury Commission in one county. Most all of my Grand Juries and Petit Juries have sizeable numbers of blacks on them, both men and women. I don't appoint Grand Jury Foreman very often because when their two year term expires, I usually reappoint them, thus they serve a long time and the problem doesn't come up very often. I don't think that I have really given any thought to appointing a black foreman but I have no feeling against doing so." *Id.*, at 113.

It was on the basis of this material in rebuttal that the District Court declined to issue the writs of habeas corpus. It found that no racial discrimination had been proved, since the foreman had been "selected for other than racial reasons, and . . . did not vote at the time the indictment was rendered." *Id.*, at 122.

The Court of Appeals, in reversing, conceded: "The facts elicited at the pretrial hearing were meager." 570 F. 2d, at 132. It went on, however, to note: "There has never been a black foreman or forewoman of a grand jury in Tipton County according to the recollections of the trial judge, three jury commissioners, and three former foremen." *Id.*, at 134–135. This fact, the court concluded, coupled with the opportunity for discrimination found to be inherent in the selection system, was sufficient to make out a prima facie case of discrimination in the selection of the foreman. And the Court of Appeals held that the State had failed to rebut that case. The exculpatory affidavit of the judge asserting a benign reason for the selection of the foreman, in the court's view, could not serve to rebut respondents' case in the absence of proof that there were no qualified Negroes to serve as foreman. The fact the foreman did not vote, the court held, similarly did not support the District Court's judgment, since the broad powers exercised by the foreman in conducting the grand jury's proceedings meant that respondents could have been prejudiced even though the foreman had not cast a vote against them.

IV

In reaching our conclusion in disagreement with the Court of Appeals, we note first that that court seems to have overemphasized and exaggerated the evidence in support of its conclusion that there had "never been a black foreman or forewoman of a grand jury in Tipton County." The Court of Appeals believed this conclusion had been proved by the recollections of the trial judge, the testimony of three jury commissioners, and the testimony of three former foremen. *Ibid.* But recollections of the trial judge—by which the Court of Appeals presumably meant the affidavit filed in Federal District Court by the trial judge—formed no part of the case put on by respondents. (Indeed, the Court of

Appeals seems to have recognized this in another portion of its opinion, where it considered the state trial judge's affidavit to have been offered in rebuttal of the respondents' asserted prima facie case.) And the jury commissioners gave no testimony whatsoever relating to foremen of the grand jury, to the method of selecting foremen, or to the race of past foremen. Thus, respondents' prima facie case as to discrimination in the selection of grand jury foremen rested entirely and only on the testimony of the three foremen. On the record of this case, it is that testimony alone upon which respondents' allegations of discrimination must stand or fall.

The testimony of the three foremen, however, did not establish respondents' case. First, it cannot be said that the testimony covered any significant period of time. Smith testified that he served in the early 1950's and occasionally thereafter, but except for the fact that Smith was resident in the county, and for his negative answer to the question whether he had "known of any foreman that has been black," there is nothing in the record to show that Smith knew who had served as foremen in the interim years when he was not serving. Similarly, McBride testified that he had served for 5 or 6 years some 10 or 12 years prior to the 1973 hearing, and on two or three occasions since then, and had not known of any Negro's having acted as foreman of the grand jury, but he gave no indication that he was knowledgeable as to the years not covered by this service. Naifeh's testimony was the weakest from respondents' point of view. He had served as foreman for only two years prior to the hearing, and he did not know one way or the other whether a Negro had served as foreman of the county grand jury. Thus, even assuming that the period 1951–1973 is the significant one for purposes of this case, respondents' evidence covered only portions of that time and left a number of years during that period about which no evidence whatsoever was offered.

Moreover, such evidence as was provided by the testifying

foremen was of little force. McBride and Smith simply said "No" in response to the question whether either had ever known of any Negro foreman. Naifeh could give no information on the point. There thus was no positive testimony that no Negro had ever served during the critical period of time; the only testimony was that three foremen who served for parts of that period had no knowledge of any. And there is no indication in the record that Smith, McBride, and Naifeh necessarily would have been aware had a Negro ever served as foreman.

Most important, there was no evidence as to the total number of foremen appointed by the judges in Tipton County during the critical period of time. Absent such evidence, it is difficult to say that the number of Negroes appointed foreman, even if zero, is statistically so significant as to make out a case of discrimination under the "rule of exclusion." The only testimony in the record concerning Negro population of the county was to the effect that it was approximately 30%.[11] App. 11. Given the fact that any foreman was not limited in the number of 2-year terms he could serve, and given the inclination on the part of the judge to reappoint, it is likely that during the period in question only a few persons in actual number served as foremen of the grand jury. If the number was small enough, the disparity between the ratio of Negroes chosen to be foreman to the total number of foremen, and the ratio of Negroes to the total population of the county, might not be "sufficiently large [that] it is unlikely that [this disparity] is due solely to chance or accident." *Castaneda* v. *Partida,* 430 U. S., at 494 n. 13. Inasmuch as there is no evidence in the record of the number of foremen appointed, it is not possible to perform the calculations and comparisons needed to permit a court to conclude that a statistical case of

[11] The 1970 census figure was 32.44%. Bureau of the Census, 1970 Census of Population, Characteristics of the Population, Part 44 Tennessee, Table 35, p. 124.

discrimination had been made out, *id.*, at 496–497, n. 17, and proof under the "rule of exclusion" fails. *Id.*, at 494 n. 13; see *Hernandez* v. *Texas*, 347 U. S., at 480.[12]

Comparison of the proof introduced by respondents in this case with the proof offered by defendants in cases where this Court has found that a prima facie case was made out is most instructive. In *Norris* v. *Alabama*, 294 U. S. 587 (1935), for example, the defendant proved his case by witnesses who testified as to the number of Negroes called for jury duty. The evidence in support of the prima facie case was summarized by the Court:

> "It appeared that no negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives. Testimony to that effect was given by men whose ages ran from fifty to seventy-six years. Their testimony was uncontradicted. It was supported by the testimony of officials. The clerk of the jury commission and the clerk of the circuit court had never known of a negro serving on a grand jury in Jackson County. The court reporter, who had not missed a session in that county in twenty-four years, and two jury commissioners testified to the same effect. One of the latter, who was a member of the commission which made up the jury roll for the grand jury which found the indictment, testified that he had 'never known of a single instance where any negro sat on any grand or

[12] Respondents urge us to fill the gap in their proof by reference to the history of race relations in Tennessee and the fact that the State in past years practiced *de jure* discrimination against Negroes in many ways. We decline to do this. Reference to history texts in a case of this kind does not supply what respondents failed to prove. If it were otherwise, one alleging discrimination always would be able to prove his case simply by referring to the history of discrimination within the State. The Court's cases, however, make it clear that more is required to establish a violation of the Equal Protection Clause of the Fourteenth Amendment.

> petit jury in the entire history of that county.'" *Id.*, at 591.

See *Castaneda* v. *Partida*, 430 U. S., at 495–496; *Eubanks* v. *Louisiana*, 356 U. S. 584, 586–587 (1958); *Reece* v. *Georgia*, 350 U. S., at 87–88; *Hill* v. *Texas*, 316 U. S., at 402–404.

The comparison of the evidence in *Norris* and in the other cited cases stands in stark contrast with the evidence in the present case. All that we have here to establish the prima facie case is testimony from two former foremen and from a briefly serving present foreman that they had no knowledge of a Negro's having served. There is no evidence that these foremen were knowledgeable about years other than the ones in which they themselves served. And there is no evidence to fill in the gaps for the years they did not serve. In contrast to *Norris*, there is no direct assertion that for long periods of time no Negro had ever served, or that officials with access to county records could state that none had ever served. And there is no basis in the record upon which to determine that, even assuming no Negro had ever served as foreman, that fact statistically was so significant as to support an inference that the disparity between the Negroes serving and the Negro population in the county was the result of discrimination in violation of the Fourteenth Amendment.

It thus was error for the District Court to have concluded initially that respondents made out a prima facie case. And it was error, as well, for the Court of Appeals to have reached the same final conclusion. The State, however, under questioning at oral argument, tended to concede that the finding that a prima facie case had been established was correct ("we did not contest that"), Tr. of Oral Arg. 6–7, and did the same in its brief, although there it described the proof as "very questionable." Brief for Petitioner 26.

Normally, a flat concession by the State might be given effect. But the inadequacy of respondents' proof is plain. And the error of the Court of Appeals in exaggerating the

extent of that proof is equally plain. We decline to overlook so fundamental a defect in respondents' case.[13]

Accordingly, we hold that, as a matter of law, respondents failed to make out a prima facie case of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment with regard to the selection of the grand jury foreman. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, concurring in part.

I fully agree with, and have joined, the separate opinions of my Brothers STEWART and POWELL concurring in the judgment in this case. For the separate reasons they state, neither of them would reach the merits of the claim of grand jury discrimination which the Court decides. Since, however, a majority of the Court rejects these views, I join Parts I, III, and IV of the Court's opinion.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

The respondents were found guilty beyond a reasonable doubt after a fair and wholly constitutional jury trial. Why should such persons be entitled to have their convictions set aside on the ground that the grand jury that indicted them was

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[13] The State in this case apparently places no reliance on 28 U. S. C. § 2254 (d), which provides in relevant part:

"[A] determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .—

"(1) that the merits of the factual dispute were not resolved in the State court hearing . . . ."

See *LaVallee* v. *Delle Rose*, 410 U. S. 690 (1973).

improperly constituted? That question was asked more than 25 years ago by Mr. Justice Jackson in *Cassell* v. *Texas*, 339 U. S. 282, 298 (dissenting opinion). It has never been answered.[1] I think the time has come to acknowledge that Mr. Justice Jackson's question is unanswerable, and to hold that a defendant may not rely on a claim of grand jury discrimination to overturn an otherwise valid conviction.

I

A grand jury proceeding "is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States* v. *Calandra*, 414 U. S. 338, 343–344. It is not a proceeding in which the guilt or innocence of a defendant is determined, but merely one to decide whether there is a prima facie case against him. Any possible prejudice to the defendant resulting from an indictment returned by an invalid grand jury thus disappears when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt.[2] In short, a convicted defendant who alleges that he was indicted by a discriminatorily selected grand jury is complaining of an

[1] In proffering an answer today, the Court relies on (1) historical precedents and (2) the duty of the courts to apply the Equal Protection Clause with special vigor in the area of racial discrimination.

As to the first ground, I can only recall what Mr. Justice Frankfurter once said: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee* v. *Union Planters Bank*, 335 U. S. 595, 600 (dissenting opinion). As to the second ground, I agree wholeheartedly with the Court's general view of the Equal Protection Clause, but believe, as explained in this opinion, that that constitutional guarantee protects the victims of discrimination rather than defendants who have been convicted after fair trials by lawfully constituted juries.

[2] There is no constitutional requirement that a state criminal prosecution even be initiated by a grand jury. A State is free to bring a criminal charge through information filed by a prosecutor. *Hurtado* v. *California*, 110 U. S. 516. And the Court has held that a defendant is not entitled "to judicial oversight or review of the decision to prosecute." *Gerstein* v. *Pugh*, 420 U. S. 103, 119.

antecedent constitutional violation that could have had no conceivable impact on the fairness of the trial that resulted in his conviction.

It is well settled that deprivations of constitutional rights that occur before trial are no bar to conviction unless there has been an impact upon the trial itself.[3] A conviction after trial, like a guilty plea, "represents a break in the chain of events which has preceded it in the criminal process." *Tollett* v. *Henderson*, 411 U. S. 258, 267. See *United States* v. *Blue*, 384 U. S. 251, 255; cf. *Stroble* v. *California*, 343 U. S. 181, 197 ("illegal acts of state officials prior to trial are relevant only as they bear on petitioner's contention that he has been deprived of a fair trial").

The cases in this Court dealing with unlawful arrest are particularly instructive. Unconstitutional arrests are unreasonable seizures of the person that violate the Fourth and Fourteenth Amendments. *E. g.*, *Terry* v. *Ohio*, 392 U. S. 1. Yet, an "illegal arrest or detention does not void a subsequent conviction." *Gerstein* v. *Pugh*, 420 U. S. 103, 119. In *Frisbie* v. *Collins*, 342 U. S. 519, for example, a defendant had been forcibly abducted from one State and brought to another to stand trial, but the trial itself was fair, and the Court upheld his conviction. See also *Mahon* v. *Justice*, 127 U. S. 700; *Ker* v. *Illinois*, 119 U. S. 436.[4]

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[3] In *Coleman* v. *Alabama*, 399 U. S. 1, the Court vacated a conviction in a situation where a State had failed to provide a defendant with appointed counsel at the preliminary hearing. The Court's holding was premised on the opportunity of defense counsel at a preliminary hearing to develop a record that could be useful for impeachment purposes at the trial. Favorable testimony of a witness who did not appear at trial could also be preserved. In addition, the Court emphasized the ability of counsel at a preliminary hearing to discover the substance of the prosecution's case and thus to prepare an effective trial defense. *Id.*, at 9.

[4] Similarly, a defendant is not immune from prosecution under an outstanding indictment if he is searched in violation of his Fourth Amendment rights or interrogated in violation of his "*Miranda*" rights. Illegally

The cases in this Court specifically dealing with grand jury proceedings are equally instructive. In *Costello* v. *United States*, 350 U. S. 359, the Court sustained the conviction of a defendant who had sought to dismiss the charges against him on the ground that the indictment had been based exclusively upon inadmissible hearsay evidence. See also *Holt* v. *United States*, 218 U. S. 245. In *Lawn* v. *United States*, 355 U. S. 339, the Court held that a defendant could not avoid trial and conviction on the ground that the indictment had been procured by evidence obtained in violation of the Fifth Amendment. "[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, . . . or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination." *United States* v. *Calandra, supra*, at 345. Cf. *Gelbard* v. *United States*, 408 U. S. 41, 60 ("The 'general rule' . . . is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government 'acquire[d] incriminating evidence in violation of the [rule],' even if the 'tainted evidence was presented to the grand jury' "); *United States* v. *Blue, supra*, at 255 n. 3.

II

A person who has been indicted on the basis of incompetent or illegal evidence has suffered demonstrable prejudice. By contrast, the prejudice suffered by a defendant who has been indicted by an unconstitutionally chosen grand jury is speculative at best, and more likely nonexistent. But there are, of course, other interests implicated when a State systematically excludes qualified Negroes from grand jury service. Such

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obtained evidence may be excluded from the trial, but the prosecution is not barred altogether. "So drastic a step might advance marginally some of the ends served by the exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." *United States* v. *Blue*, 384 U. S. 251, 255.

discrimination denies Negroes the right to participate equally in the responsibilities of citizenship. The compelling constitutional interest of our Nation in eliminating all forms of racial discrimination requires that no group of qualified citizens be excluded from participation as either grand or petit jurors in the administration of justice.

These interests can be fully vindicated, however, by means other than setting aside valid criminal convictions. This Court has held, for example, that Negroes can obtain injunctive relief to remedy unconstitutional exclusion from grand or petit jury service. *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320; *Turner* v. *Fouche*, 396 U. S. 346. That remedy has the advantage of allowing the members of the class actually injured by grand jury discrimination to vindicate their rights without the heavy societal cost entailed when valid criminal convictions are overturned.[5] Moreover, Congress has made it a criminal offense for a public official to exclude any person from a grand or petit jury on the basis of his or her race. 18 U. S. C. § 243.[6] Defendants may also have pretrial remedies against unlawful indictments. But, as Mr. Justice Jackson stated in the *Cassell* case, "[i]t hardly lies in

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[5] That Negroes are the class most directly affected by grand jury discrimination was first recognized by this Court in the landmark case of *Strauder* v. *West Virginia*, 100 U. S. 303. The Court stated:

"The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.*, at 308.

Since qualified Negroes can now vindicate their rights directly, the rationale for allowing a defendant who has been convicted by a constitutional petit jury to assert the rights of Negroes who were excluded from the grand jury has been undermined.

[6] The constitutionality of this statute was upheld in *Ex parte Virginia*, 100 U. S. 339.

the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice." 339 U. S., at 302.

For all these reasons, I believe that a claim of discrimination in the selection of a grand jury or its foreman is not a ground for setting aside a valid criminal conviction. Accordingly, I concur only in the judgment.

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

I agree that respondents' convictions should not be overturned. As the Court holds, respondents failed to show a prima facie case of discrimination in the selection of the foreman of the grand jury that indicted them. A more fundamental reason exists, however, for reversing the judgment of the Court of Appeals. Respondents were found guilty of murder beyond a reasonable doubt by a petit jury whose composition is not questioned, following a trial that was fair in every respect. Furthermore, respondents were given a full and fair opportunity to litigate in the state courts their claim of discrimination. In these circumstances, allowing an attack on the selection of the grand jury in this case is an abuse of federal habeas corpus.

Whenever a federal court is called upon by a state prisoner to issue a writ of habeas corpus, it is asked to do two things that should be undertaken only with restraint and respect for the way our system of justice is structured. First, as one court of general jurisdiction, it is requested to entertain a collateral attack upon the final judgment of another court of general jurisdiction. Second, contrary to principles of federalism, a lower federal court is asked to review not only a state trial court's judgment, but almost invariably the judgment of the highest court of the State as well.[1] These con-

[1] Both advocates and opponents of broad federal habeas corpus relief have recognized the unusual role the Great Writ plays in our federal sys-

siderations prompt one to inquire, more critically than this Court ever has, whether it is appropriate to allow the use of habeas corpus by state prisoners who do not seek to protect their personal interest in the justness of their convictions.

I

The history and purpose of the writ of habeas corpus do not support the application of the writ suggested by five Members of the Court today. Originally, this writ was granted only when the criminal trial court had been without jurisdiction to entertain the action. See, *e. g., Ex parte Watkins*, 3 Pet. 193, 202 (1830); *Schechtman* v. *Foster*, 172 F. 2d 339 (CA2 1949), cert. denied, 339 U. S. 924 (1950); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 254 (1973) (POWELL, J., concurring); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 468 (1966); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 466 (1963) (hereinafter Bator). Subsequently, the scope of the writ was modestly expanded to encompass those cases where the defendant's federal constitutional claims had not been considered in the state-court proceeding. See *Frank* v. *Mangum*, 237 U. S. 309 (1915). In recent years, this Court has extended habeas corpus far beyond the historical uses to which the writ was put. Today, federal habeas is granted in a variety of situations where, although the trial court plainly had jurisdiction over the case, and the defendant's constitutional claims were fully and fairly considered by the state courts, some sort of constitutional error is found to have been committed. *E. g., Brown* v. *Allen*, 344 U. S. 443 (1953); see *Fay* v. *Noia*, 372 U. S. 391, 449-463 (1963) (Harlan, J., dissenting).

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tem. See Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 463 (1963); Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1330–1331 (1961).

I do not suggest that we should revert to the 19th-century conception of the writ and limit habeas corpus to those circumstances where the trial court lacked jurisdiction to enter a competent judgment. In expanding the scope of habeas corpus, however, the Court seems to have lost sight entirely of the historical purpose of the writ. It has come to accept review by federal district courts of state-court judgments in criminal cases as the rule, rather than the exception that it should be. Federal constitutional challenges are raised in almost every state criminal case, in part because every lawyer knows that such claims will provide nearly automatic federal habeas corpus review. If we now extend habeas corpus to encompass constitutional claims unrelated to the fairness of the trial in which the claimant was convicted, we will take another long step toward the creation of a dual system of review under which a defendant convicted of crime in a state court, having exhausted his remedies in the state system, repeats the process through the federal system. The extent to which this duplication already exists in this country is without parallel in any other system of justice in the world.[2]

We simply have not heeded the admonition of thoughtful scholars that federal habeas corpus should not be "made the instrument for re-determining the merits of all cases in the legal system that have ended in detention." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1428 (2d ed. 1973); see Bator 446–448. Today's case is an extreme example of this loss of historical perspective. In extending use of the writ to circumstances wholly unrelated to its purpose, the Court would move beyond anything heretofore

[2] Not only may the state claimant have a "rerun" of his conviction in the federal courts, but also there is no limit to the number of habeas corpus petitions such a claimant may file. The jailhouse lawyers in the prisons of this country conduct a flourishing business in repetitive habeas corpus petitions. It is not unusual to see, at this Court, a score or more of petitions filed over a period of years by the same claimant.

decided in our cases. It is true that on a number of occasions this Court has considered state grand jury discrimination, but no prior decision fairly can be viewed as authority for federal habeas corpus review in the absence of a challenge to the fairness of the trial itself. *Strauder* v. *West Virginia,* 100 U. S. 303 (1880), and all of its progeny, involved cases in which the composition of both the grand and petit juries was challenged, so that the integrity of the trial itself was at issue. In cases such as *Pierre* v. *Louisiana,* 306 U. S. 354 (1939), and *Hill* v. *Texas,* 316 U. S. 400 (1942), the question of discrimination in selection of the grand jury was presented on direct appeal, and there was no occasion to consider the propriety of federal collateral attack. Finally, in *Castaneda* v. *Partida,* 430 U. S. 482 (1977), the charge of grand jury discrimination was before the Court on habeas corpus, but the propriety of the use of habeas corpus to assert the claim was not raised, and hence was not decided. *Id.*, at 508 n. 1 (POWELL, J., dissenting). Until today, therefore, it has been an open question whether federal habeas corpus could be granted a state prisoner solely because the prisoner's grand jury was discriminatorily chosen.[3]

II

The Court makes no pretense of arguing that either the history or purpose of the writ of habeas corpus supports its extension to a case such as this, where the claimant concededly was found guilty after a fair trial. Rather, the Court looks to the policies of the Fourteenth Amendment for justification, noting that the Amendment's purpose was to eliminate racial discrimination such as respondents here al-

[3] Although the opinion of the Court discusses the extension of habeas corpus to claims of grand jury discrimination, this discussion is unnecessary in view of the Court's conclusion that no prima facie case of discrimination was made out by respondents. Indeed, it may fairly be questioned whether Part II of the opinion is part of the holding of the Court, for not all of the four Members who join it support even the Court's judgment.

lege.[4] Apart from the fact that other, more appropriate means are available for attacking discrimination in the selection of grand juries,[5] the Fourteenth Amendment is irrelevant to a principled determination of when the writ of habeas corpus is a proper remedy. I know of nothing in the language or history of the Fourteenth Amendment, or the civil rights statutes implementing it, that suggests some special use of the writ of habeas corpus. If, however, we are to assume that it is open to this Court to extend the writ to cases in which the guilt of the incarcerated claimant is not an issue, at least we should weigh thoughtfully the societal costs that may be involved. As some of these were fully addressed in my concurring opinion in *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1972), I now mention the principal costs only briefly.

A

Because habeas corpus is a unique remedy which allows one court of general jurisdiction to review the correctness of the judgment of another court of general jurisdiction, its exercise entails certain costs inherent whenever there is dual

[4] The Court explicitly bases its extension of habeas corpus in this case upon its conclusion that the constitutional interests involved in a claim of grand jury discrimination are "more compelling" than those involved in other constitutional claims. See *ante*, at 564. It is not clear, however, that it would be possible to cabin the Court's rule to cases where racial discrimination is alleged. There are, of course, numerous constitutional challenges to grand jury indictments that have nothing to do with racial discrimination. The logic of the Court's position may lead to the extension of habeas corpus to every conceivable constitutional defect in indictments.

[5] As MR. JUSTICE STEWART points out, a federal statute makes it a crime to discriminate on the basis of race in the selection of jurors, 18 U. S. C. § 243, and both Government and private actions may be brought by those improperly excluded from jury service. See *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320 (1970). Furthermore, in the past this Court has allowed a claim of grand jury discrimination to be made on direct appeal from a conviction. See *Cassell* v. *Texas*, 339 U. S. 282 (1950). But see n. 9, *infra*.

review. It is common knowledge that prisoner actions occupy a disproportionate amount of the time and energy of the federal judiciary. In the year ending June 30, 1978, almost 9,000 of the prisoner actions filed were habeas corpus petitions. See 1978 Annual Report of the Director of the Administrative Office of the United States Courts 76. Apart from the burden of these petitions, many of which are frivolous, collateral review can have a particularly deleterious effect upon both the deterrent and rehabilitative functions of the criminal justice system. See *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977); *Sanders* v. *United States*, 373 U. S. 1, 24–25 (1963) (Harlan, J., dissenting); Bator 452, Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146 (1970).

Perhaps the most serious cost of extending federal habeas corpus review of state judgments is the effect upon the federal structure of our government.[6] Mr. Justice Black has emphasized the importance of

> "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the

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[6] The Court suggests that "federalism concerns . . . are not present" when the fairness of an indictment is challenged on federal habeas, because "[f]ederal courts have granted relief to state prisoners upon proof of the proscribed discrimination for nearly a century. See, *e. g.*, *Virginia* v. *Rives*, 100 U. S. [313,] 322 [(1880)]." *Ante*, at 562. There is no logic to this reasoning. The mere fact that federal courts have reviewed some state-court decisions for nearly a century hardly supports a conclusion that no federalism concerns exist. Nor does *Virginia* v. *Rives* support the Court's argument. In that case, the petitioner challenged the composition of his *petit* jury, as well as that of the grand jury that had indicted him. Whenever the fairness of the petit jury is brought into question doubts are raised as to the integrity of the process that found the prisoner guilty. See *Cassell* v. *Texas*, *supra*, at 301–302 (Jackson, J., dissenting). Collateral relief therefore may be justified even though it entails some damages to our federal fabric. See *infra*, at 586.

> States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U. S. 37, 44 (1971).

See also *National League of Cities* v. *Usery*, 426 U. S. 833, 844 (1976); *Schneckloth* v. *Bustamonte*, *supra*, at 264–265 (POWELL, J., concurring). Nowhere has a "proper respect for state functions" been more essential to our federal system than in the administration of criminal justice. This Court repeatedly has recognized that criminal law is primarily the business of the States, and that absent the most extraordinary circumstances the federal courts should not interfere with the States' administration of that law. See, *e. g.*, *Younger* v. *Harris*, *supra*; *Perez* v. *Ledesma*, 401 U. S. 82 (1971).

The overextension of habeas corpus by federal courts does more than simply threaten the essential role of the States in our federal system. It runs afoul of the very principle of primary state jurisdiction over the criminal laws that the Court repeatedly has asserted. This interference with state operations is not merely academic. The review by a single federal district court judge of the considered judgment of a state trial court, an intermediate appellate court, and the highest court of the State, necessarily denigrates those institutions.[7]

B

The Court's expansion of our dual system of review therefore inflicts substantial costs on society, our system of justice,

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[7] The Court implies that state trial judges cannot be trusted to rule fairly on the issue here presented, because they are involved administratively in the selection of the grand jury. *Ante*, at 561, 563. This is a view I find wholly unacceptable. In numerous circumstances, trial judges are called upon to rule on the validity of their own judicial and administrative action. I know of no general constitutional rule requiring disqualification in such cases. I certainly would not accept an assumption at this point in our history that state judges in particular cannot be trusted fairly to consider claims of racial discrimination. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 263–264, n. 20 (1973) (POWELL, J., concurring).

and our federal fabric. When the claim being vindicated on federal habeas corpus is that the individual claimant is being unjustly incarcerated, these costs are justified, for the very purpose of the Great Writ is to provide some means by which the legality of an individual's incarceration may be tested. See *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973); *McNally* v. *Hill*, 293 U. S. 131, 136–137 (1934); *Schneckloth* v. *Bustamonte*, 412 U. S., at 252–256 (POWELL, J., concurring). Indeed, it is only by providing a means of releasing prisoners from custody that we can assure that no innocent person will be incarcerated, a pre-eminent objective of our criminal justice system. See *Jackson* v. *Virginia*, *ante*, at 315–316; *In re Winship*, 397 U. S. 358, 371 (1970) (Harlan, J., concurring).

Preventing discrimination in the selection of grand juries also is a goal of high priority in our system.[8] But the question is not simply, as the Court seems to think, whether the goal and the interests it serves are important. Habeas corpus is not a *general* writ meant to promote the social good or vindicate all societal interests of even the highest priority. The question rather is whether this ancient writ, developed by the law to serve a precise and particular purpose, properly may be employed for the furthering of the general societal goal of grand jury integrity. For the provision of indictment by grand jury does not protect innocent defendants from unjust convictions. Rather, it helps to assure that innocent persons will not be made unjustly to stand trial at all. Once

[8] The Court also would justify collateral review of claims of grand jury discrimination because of the damage that such discrimination can do to the perceived integrity of the judicial system as a whole. But it ignores the damage done to society's perception of the criminal justice system by allowing valid convictions to be reversed on collateral attack on the basis of claims having nothing to do with the defendant's guilt or innocence. Moreover, any discriminatory action so notorious as to undermine the public's faith in the fairness of the judiciary is likely to be remedied on direct review by the state courts and by this Court.

a defendant is found guilty beyond a reasonable doubt by a fairly drawn petit jury, following a fair trial, he hardly can claim that it was unjust to have made him stand trial.[9] Because the need to protect the innocent from incarceration is not implicated in cases such as this, the writ of habeas corpus is not an appropriate remedy. Other remedies can be, and have been, provided to protect society's interest in eliminating racial discrimination in the selection of those who are to serve on grand juries. See n. 5, *supra*.[10]

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[9] Although I need not reach the question in this case, I find much of what MR. JUSTICE STEWART says persuasive on the question whether complaints concerning the fairness of indictment should survive conviction even for purposes of direct appeal. See *ante*, p. 574. In his dissenting opinion in *Cassell* v. *Texas*, Mr. Justice Jackson suggested that "any discrimination in selection of the grand jury in this case, however great the wrong toward qualified Negroes of the community, was harmless to this defendant." 339 U. S., at 304. Until today this Court never has undertaken to answer Mr. Justice Jackson's arguments in *Cassell*. Nor am I completely satisfied with today's attempt. For purposes of this opinion, however, I shall assume that direct review of respondents' claims was appropriate.

[10] Finding no support in our prior decisions for today's extension of habeas corpus, the Court considers only whether our decision in *Stone* v. *Powell*, 428 U. S. 465 (1976), forbids federal courts to grant habeas corpus in cases such as this. *Stone*, of course, did not address the proper method for presenting claims of grand jury discrimination, as it involved only claims under the Fourth Amendment exclusionary rule. Nonetheless, the Court overstates the differences between *Stone* and the present case. See *ante*, at 560–564. To be sure, in *Stone* v. *Powell*, *supra*, at 495 n. 37, we emphasized that the Fourth Amendment exclusionary rule was a "judicially created remedy rather than a personal constitutional right." We did so, however, only in rejecting the suggestion of the dissent that our decision would lead to a "drastic withdrawal of federal habeas jurisdiction," 428 U. S., at 517, the extent of which might be unlimited. *Stone* recognized that the Fourth Amendment exclusionary rule was not designed to protect the right of an individual to be free from unjust conviction. Thus, the justification for undermining the finality of state-court judgments that exists in many habeas corpus actions was absent. Properly understood, therefore, the rationale of our decision in *Stone* is not only

III

In sum, I view the Court's extension today of federal habeas corpus to be wholly at odds with the history and purpose of the writ. Furthermore, any careful analysis of the costs and benefits of the Court's approach plainly shows that habeas corpus should not be available for the vindication of claims, such as respondents' grand jury discrimination claim, that have nothing to do with the fairness of the claimant's conviction. Courts often are tempted to reach for any available remedy when they have before them a claim of intrinsic importance. In my view, however, this is an unprincipled way in which to administer the judicial process, especially when other remedies are available to protect the interests at stake. I therefore would hold that a challenge to the composition of a state prisoner's grand jury cannot be raised in a collateral federal challenge to his incarceration, provided that a full and fair opportunity was provided in the state courts for the consideration of the federal claim.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEVENS joins, dissenting.

Although I agree with Parts I and II of the Court's opinion, I believe that a prima facie case of purposeful discrimination was made out and was not rebutted by the State. I therefore dissent from Parts III and IV and from the judgment. On the basis of the evidence presented at the evidentiary hearing in state court, the District Court concluded that respondents "appear[ed]" to have made out a prima facie case of discrimination in the selection of the foreman of the grand

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consistent with denying collateral relief for claims of unfair indictment, but actually presages such a limitation on habeas corpus. For, as I have stated in the text above, the right not to be indicted by a discriminatorily selected grand jury, like the right not to have improperly obtained, but highly probative, evidence introduced at trial, has nothing to do with the guilt or innocence of the prisoner.

jury that indicted them. App. 99. However, upon the affidavits submitted by the State in response, the court concluded that in fact the foreman had been chosen for other than racial reasons, that he had not voted on the indictment, and thus that there had not been a violation of the Equal Protection Clause. *Id.*, at 122. The Court of Appeals agreed that a prima facie case was shown, interpreting the record testimony to the effect that the recollections of those testifying were that there had never been a black chosen as foreman of a grand jury in Tipton County, and pointing out the potential for discrimination in a system which leaves the selection of the foreman to the discretion of a single judge who has not "really given any thought to appointing" a black, *id.*, at 113. See 570 F. 2d 129, 134–135 (1978). The Court of Appeals disagreed, however, that this prima facie case had been rebutted by the testimony of the selecting judge that he had "no feeling against" appointing a black to be foreman, and found irrelevant that the foreman did not vote on respondents' indictment. *Id.*, at 131. Because we do not sit to redetermine the factfindings of lower courts, and because the Court of Appeals correctly enunciated and applied the law governing proof of discrimination in the context of grand jury selection, I dissent.

The only difference between this case and our previous cases voiding a conviction due to discriminatory selection of members of the grand jury is that in this case it has been shown only that the grand jury foreman, who did not vote on the indictment, was chosen in a manner prohibited by the Equal Protection Clause. I agree with the Court of Appeals that given the vital importance of the foreman in the functioning of grand juries in Tennessee,[1] a conviction based on an

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[1] See 570 F. 2d 129, 136 (1978):

"The foreman or forewoman is vitally important to the functioning of grand juries in Tennessee, being 'the thirteenth member of each grand jury organized during his term of office, having equal power and author-

indictment where the foreman was chosen in a discriminatory fashion is void just as would be a conviction where the entire grand jury is discriminatorily selected, whether or not there is a showing of actual prejudice, see *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Alexander* v. *Louisiana*, 405 U. S. 625 (1972); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Bush* v. *Kentucky*, 107 U. S. 110 (1883).

That this case involves only the foreman, rather than the entire grand jury, does have implications for the manner in which respondents may meet their burden of proving discrimination. In the context of racial discrimination in the selection of juries, "the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination,'" a necessary component of any equal protection violation. *Washington* v. *Davis*, 426 U. S. 229, 241 (1976). Generally, in those cases in which we have found unconstitutional discrimination in jury selection, those alleging discrimination have relied upon a significant statistical discrepancy between the percentage of the underrepresented group in the population and the percentage of this group called to serve as jurors, combined with a selection procedure "that is susceptible of abuse or is not racially neutral." *Castaneda* v. *Partida*, *supra*, at 494. See, *e. g.*, *Alexander* v. *Louisiana*, *supra*; *Turner* v. *Fouche*, 396 U. S. 346 (1970); *Carter* v. *Jury Comm'n*, 396 U. S. 320 (1970). Once this

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ity in all matters coming before the grand jury with the other members thereof.' Tenn. Code Ann. § 40-1506. He or she is expected to assist the district attorney in investigating crime, may administer oaths to all witnesses, conduct the questioning of witnesses, must indorse and sign all indictments, and like every other chairperson is in a position to guide, whether properly or improperly, the decision-making process of the body. . . ." (Footnote omitted.)

showing is made, the burden shifts to the State to rebut the inference of discriminatory purpose. *Castaneda* v. *Partida, supra,* at 495. This method of proof, sometimes called the "rule of exclusion," 430 U. S., at 494, may not be well suited when the focus of inquiry is a single officeholder whose term lasts two full years, as is true of the Tipton County grand jury foreman. For instance, in *Castaneda* v. *Partida,* we considered statistics relating to an 11-year period showing that 39% of the 870 persons selected for grand jury duty were Hispanic, from a general population that was over 79% Hispanic. The likelihood that this statistical discrepancy could be explained on the basis of chance alone was less than 1 in 10^{140}. See *id.,* at 495–496, and n. 17. The sample size necessarily considered in a case of discrimination in the selection of a foreman simply does not permit a statistical inference as overwhelming as that in *Castaneda.* During any 11-year period, there would be only five or six opportunities for selecting jury foremen in Tipton County, assuming that every foreman selected serves at least the full 2-year term.[2]

Despite the inherent difficulty of any statistical presentation with respect to discrimination in filling a particular grand jury spot, respondents nonetheless have made a strong showing of underrepresentation supporting an inference of purposeful discrimination. This Court is not in a position to reject the finding, explicitly made by the Court of Appeals and implicitly made by the District Court,[3] that those who testified believed

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[2] The key numbers to compare are the number of blacks selected to be foremen and the total number of opportunities to select a foreman. The latter number may be greater than the number of different individuals who serve if the appointing judge has an inclination to reappoint those who have previously served.

[3] The District Court did not make written findings of fact explaining the basis of its conclusion that a prima facie case appeared to have been established. However, the Court of Appeals was in a position to dispose of the appeal, without the necessity of a remand to the District Court, because the record and the District Court's conclusions of law clearly

there had never been a black foreman during the period 1951–1973. See *Berenyi* v. *Immigration Director*, 385 U. S. 630, 635 (1967); *Graver Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949). Assuming that 11 foreman selections were made during this period,[4] the expected number of black foremen would be more than 3—and the likelihood of no blacks being chosen would be less than 1 in 50—if blacks, who constituted nearly a third of the county's population, and whites had an equal chance of being selected. I do not see how respondents could be expected to make a stronger statistical showing.[5]

In any event, any possible weakness in respondents' statistical presentation was more than overcome by the additional evidence before the District Court. First, the selection of a foreman is left to the complete discretion of a single person—the circuit judge. The potentialities for abuse in such a system are obvious, cf. *Castaneda* v. *Partida*, *supra*, at 497; *Carter* v. *Jury Comm'n*, *supra*; *Hernandez* v. *Texas*, 347 U. S. 475, 479 (1954) ("key man" system). Moreover, the particular judge who chose the foreman of respondents' grand jury had

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reveal the basis for its conclusion, see *Finney* v. *Arkansas Board of Correction*, 505 F. 2d 194 (CA8 1974). This was the failure of any of the foremen who testified at the state-court hearing to recollect there having been a black foreman, and the inference therefrom—not clearly erroneous, see Fed. Rule Civ. Proc. 52 (a)—that these witnesses believed there had never been a black foreman.

[4] See n. 2, *supra*.

[5] If there were any doubt that the evidence adduced in the state-court hearing on respondents' plea in abatement was insufficient—perhaps because it did not unequivocally establish the race of every foreman chosen since 1950—the appropriate course would be for the District Court to hold an evidentiary hearing. See *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963) (evidentiary hearing must be held "unless the state-court trier of fact has after a full hearing reliably found the relevant facts"); 28 U. S. C. § 2254 (d)(3) (determination of merits of factual issue by state court shall be presumed to be correct unless it appears "that the material facts were not adequately developed at the State court hearing").

never chosen a black in any of the five counties for which he appointed foremen over a 6-year period, App. 113. Finally, the judge himself admitted that he had never even considered appointing a black foreman. *Ibid.*[6] Although these facts are not necessarily inconsistent with an ultimate conclusion that respondents' foreman was not chosen on racial grounds, they raise, in conjunction with the previously described statistical presentation, a strong inference of intentional racial discrimination, shifting the burden to the State. Clearly the Court of Appeals is correct that the Circuit Judge's further self-serving statement that he had "nothing against" appointing blacks is not sufficient rebuttal, see *Alexander* v. *Louisiana*, 405 U. S., at 632; *Turner* v. *Fouche*, 396 U. S., at 361; *Hernandez* v. *Texas*, *supra*, at 481–482. It can hardly be said that the judge, as the official authorized by the State to appoint grand jury foremen, performed his "constitutional duty . . . not to pursue a course of conduct in the administration of [his] office which would operate to discriminate in the selection of jurors on racial grounds." *Hill* v. *Texas*, 316 U. S., at 404.

MR. JUSTICE STEVENS, dissenting in part.

MR. JUSTICE STEWART's opinion prompts me to explain that by joining Part II of the Court's opinion I do not necessarily indicate that I would have rejected the arguments set forth in Mr. Justice Jackson's dissenting opinion in *Cassell* v. *Texas*, 339 U. S. 282, 298, if I had been a Member of the Court when the issue was first addressed. But there is surely enough force to MR. JUSTICE BLACKMUN's reasoning to require adherence

[6] Clearly, it is irrelevant that the admissions on the part of the selecting judge that he had never given thought to appointing, and indeed had never appointed, a black foreman came as part of the petitioner's written response to respondents' petitions for writs of federal habeas corpus. In ascertaining whether a plaintiff has carried his burden of proof, all the evidence must be considered. It is not unusual that an affidavit or other evidence submitted by one party to a lawsuit turns out to be of primary, and perhaps even determinative, aid to the other party.

to a course of decision that has been consistently followed by this Court since 1880.

The doctrine of *stare decisis* is not a straitjacket that forecloses re-examination of outmoded rules. The doctrine does, however, provide busy judges with a valid reason for refusing to remeasure a delicate balance that has tipped in the same direction every time the conflicting interests have been weighed.

The *stare decisis* considerations that weigh heavily in my decision to join Part II of the Court's opinion also support MR. JUSTICE WHITE's opinion dissenting from Parts III and IV. Accordingly, I join his dissent.

Syllabus

JONES ET AL. *v.* WOLF ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 78–91. Argued January 16, 1979—Decided July 2, 1979

This case involves a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization. The property of the Vineville Presbyterian Church of Macon, Ga. (local church), is held in the names of the local church or of trustees for the local church. That church, however, was established as a member of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS), which has a generally hierarchical form of government. Under the polity of the PCUS, the government of the local church is committed to its Session in the first instance, but the actions of this "court" are subject to the review and control of the higher church courts (the Presbytery, Synod, and General Assembly). At a congregational meeting attended by a quorum of the local church's members, 164 of them voted to separate from the PCUS, while 94 opposed the resolution. The majority then united with another denomination and has retained possession of the local church property. The Augusta-Macon Presbytery appointed a commission to investigate the dispute, and the commission eventually issued a ruling declaring that the minority faction constituted the "true congregation" of the local church, and withdrawing from the majority faction "all authority to exercise office derived from the [PCUS]." Representatives of the minority faction brought this class action in state court, seeking declaratory and injunctive orders establishing their right to exclusive possession and use of the local church's property as a member of the PCUS. The trial court, purporting to apply Georgia's "neutral principles of law" approach to church property disputes, granted judgment for the majority. The Georgia Supreme Court affirmed, holding that the trial court had correctly stated and applied Georgia law and rejecting the minority's challenge based on the First and Fourteenth Amendments.

Held:

1. As a means of adjudicating a church property dispute, a State is constitutionally entitled to adopt a "neutral principles of law" analysis involving consideration of the deeds, state statutes governing the holding of church property, the local church's charter, and the general church's constitution. The First Amendment does not require the States to adopt a rule of compulsory deference to religious authority in

resolving church property disputes, even where no issue of doctrinal controversy is involved. Pp. 602–606.

2. Here, the case must be remanded since the grounds for the Georgia courts' decision that the majority faction represents the local church were not articulated, both the trial court and the Georgia Supreme Court having applied Georgia's neutral-principles analysis as developed in cases involving church property disputes between general churches and entire local congregations, without alluding to the significant complicating factor in the present case that the local congregation was itself divided. If in fact Georgia has adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, this would be consistent with both the neutral-principles analysis and the First Amendment. However, there are at least some indications that under Georgia law the process of identifying the faction that represents a local church involves considerations of religious doctrine and polity, and thus if Georgia law provides that the identity of the local church here is to be determined according to the laws and regulations of the PCUS, then the First Amendment requires that the Georgia courts give deference to the presbyterial commission's determination that the minority faction represents the "true congregation." Pp. 606–610.

241 Ga. 208, 243 S. E. 2d 860, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and WHITE, JJ., joined, *post*, p. 610.

E. Barrett Prettyman, Jr., argued the cause for petitioners. With him on the briefs were *Allen R. Snyder, Walter A. Smith, Jr., John B. Harris, Jr., T. Reese Watkins,* and *H. T. O'Neal, Jr.*

Frank C. Jones argued the cause for respondents. With him on the brief were *Wallace Miller, Jr., W. Warren Plowden, Jr.,* and *Edward S. Sell, Jr.**

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*Briefs of *amici curiae* urging reversal were filed by *Samuel W. Witwer, Sr.*, and *Samuel W. Witwer, Jr.*, for the General Council on Finance and Administration of the United Methodist Church; by *J. D. Todd, Jr.*, and *David A. Quattlebaum III* for the Presbyterian Church in the United

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization. The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of "neutral principles of law," or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church.

I

The Vineville Presbyterian Church of Macon, Ga., was organized in 1904, and first incorporated in 1915. Its corporate charter lapsed in 1935, but was revived and renewed in 1939, and continues in effect at the present time.

The property at issue and on which the church is located was acquired in three transactions, and is evidenced by conveyances to the "Trustees of [or 'for'] Vineville Presbyterian Church and their successors in office," App. 251, 253, or simply to the "Vineville Presbyterian Church." *Id.*, at 249. The funds used to acquire the property were contributed entirely by local church members. Pursuant to resolutions adopted by the congregation, the church repeatedly has borrowed money on the property. This indebtedness is evidenced by security deeds variously issued in the name of the "Trustees of the Vineville Presbyterian Church," *e. g.*, *id.*, at 278, or, again, simply the "Vineville Presbyterian Church." *Id.*, at 299.

In the same year it was organized, the Vineville church was established as a member church of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS). The PCUS has a generally hierarchical or connec-

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States; and by *George Wilson McKeag* and *Gregory M. Harvey* for William P. Thompson et al.

George E. Reed and *Patrick F. Geary* filed a brief for the United States Catholic Conference as *amicus curiae*.

tional form of government, as contrasted with a congregational form. Under the polity of the PCUS, the government of the local church is committed to its Session in the first instance, but the actions of this assembly or "court" are subject to the review and control of the higher church courts, the Presbytery, Synod, and General Assembly, respectively. The powers and duties of each level of the hierarchy are set forth in the constitution of the PCUS, the Book of Church Order, which is part of the record in the present case.

On May 27, 1973, at a congregational meeting of the Vineville church attended by a quorum of its duly enrolled members, 164 of them, including the pastor, voted to separate from the PCUS. Ninety-four members opposed the resolution. The majority immediately informed the PCUS of the action, and then united with another denomination, the Presbyterian Church in America. Although the minority remained on the church rolls for three years, they ceased to participate in the affairs of the Vineville church and conducted their religious activities elsewhere.

In response to the schism within the Vineville congregation, the Augusta-Macon Presbytery appointed a commission to investigate the dispute and, if possible, to resolve it. The commission eventually issued a written ruling declaring that the minority faction constituted "the true congregation of Vineville Presbyterian Church," and withdrawing from the majority faction "all authority to exercise office derived from the [PCUS]." App. 235. The majority took no part in the commission's inquiry, and did not appeal its ruling to a higher PCUS tribunal.

Representatives of the minority faction sought relief in federal court, but their complaint was dismissed for want of jurisdiction. *Lucas* v. *Hope*, 515 F. 2d 234 (CA5 1975), cert. denied, 424 U. S. 967 (1976). They then brought this class action in state court, seeking declaratory and injunctive orders establishing their right to exclusive possession and use of the

Vineville church property as a member congregation of the PCUS. The trial court, purporting to apply Georgia's "neutral principles of law" approach to church property disputes, granted judgment for the majority. The Supreme Court of Georgia, holding that the trial court had correctly stated and applied Georgia law, and rejecting the minority's challenge based on the First and Fourteenth Amendments, affirmed. 241 Ga. 208, 243 S. E. 2d 860 (1978). We granted certiorari. 439 U. S. 891 (1978).

II

Georgia's approach to church property litigation has evolved in response to *Presbyterian Church* v. *Hull Church*, 393 U. S. 440 (1969) (*Presbyterian Church I*), rev'g *Presbyterian Church* v. *Eastern Heights Church*, 224 Ga. 61, 159 S. E. 2d 690 (1968). That case was a property dispute between the PCUS and two local Georgia churches that had withdrawn from the PCUS. The Georgia Supreme Court resolved the controversy by applying a theory of implied trust, whereby the property of a local church affiliated with a hierarchical church organization was deemed to be held in trust for the general church, provided the general church had not "substantially abandoned" the tenets of faith and practice as they existed at the time of affiliation.[1] This Court reversed, holding that Georgia would have to find some other way of resolving church property disputes that did not draw the state courts into religious controversies. The Court did not specify what that method should be, although it noted in passing that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." 393 U. S., at 449.

[1] This is sometimes referred to as the "English approach" to resolving property disputes in hierarchical churches. See *Presbyterian Church I*, 393 U. S., at 433, and n. 2; *Watson* v. *Jones*, 13 Wall. 679, 727–728 (1872).

On remand, the Georgia Supreme Court concluded that, without the departure-from-doctrine element, the implied trust theory would have to be abandoned in its entirety. *Presbyterian Church* v. *Eastern Heights Church*, 225 Ga. 259, 167 S. E. 2d 658 (1969) (*Presbyterian Church II*). In its place, the court adopted what is now known as the "neutral principles of law" method for resolving church property disputes. The court examined the deeds to the properties, the state statutes dealing with implied trusts, Ga. Code §§ 108–106, 108–107 (1978), and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church. Finding nothing that would give rise to a trust in any of these documents, the court awarded the property on the basis of legal title, which was in the local church, or in the names of trustees for the local church. 225 Ga., at 261, 167 S. E. 2d, at 660. Review was again sought in this Court, but was denied. 396 U. S. 1041 (1970).

The neutral-principles analysis was further refined by the Georgia Supreme Court in *Carnes* v. *Smith*, 236 Ga. 30, 222 S. E. 2d 322, cert. denied, 429 U. S. 868 (1976). That case concerned a property dispute between The United Methodist Church and a local congregation that had withdrawn from that church. As in *Presbyterian Church II*, the court found no basis for a trust in favor of the general church in the deeds, the corporate charter, or the state statutes dealing with implied trusts. The court observed, however, that the constitution of The United Methodist Church, its Book of Discipline, contained an express trust provision in favor of the general church.[2] On this basis, the church property was

[2] The Book of Discipline of The United Methodist Church ¶ 1537 (1968) requires that

"title to all real property now owned or hereafter acquired by an unincorporated local church . . . shall be held by and/or conveyed and transferred to its duly elected trustees . . . and their successors in office . . . in trust, nevertheless, for the use and benefit of such local church *and of*

awarded to the denominational church. 236 Ga., at 39, 222 S. E. 2d, at 328.

In the present case, the Georgia courts sought to apply the neutral-principles analysis of *Presbyterian Church II* and *Carnes* to the facts presented by the Vineville church controversy. Here, as in those two earlier cases, the deeds conveyed the property to the local church. Here, as in the earlier cases, neither the state statutes dealing with implied trusts, nor the corporate charter of the Vineville church, indicated that the general church had any interest in the property. And here, as in *Presbyterian Church II*, but in contrast to *Carnes*, the provisions of the constitution of the general church, the Book of Church Order, concerning the ownership and control of property failed to reveal any language of trust in favor of the general church. The courts accordingly held that legal title to the property of the Vineville church was vested in the local congregation. Without further analysis or elaboration, they further decreed that the local congregation was represented by the majority faction, respondents herein. App. to Pet. for Cert. 9a.; 241 Ga., at 212, 243 S. E. 2d, at 864.

The United Methodist Church. Every instrument of conveyance of real estate shall contain the appropriate trust clause as set forth in the Discipline (¶ 1503)" (emphasis added).

Although in *Carnes* the deeds to the local church did not contain the required trust clause, The Book of Discipline provided that in the absence of a trust clause, a trust in favor of The United Methodist Church was to be implied if (a) the conveyance was to the trustees of a local church or agency of any predecessor to The United Methodist Church, or (b) the local church used the name of any predecessor to The United Methodist Church and was known to the community as a part of the denomination, or (c) the local church accepted the pastorate of ministers appointed by any predecessor to The United Methodist Church. The Book of Discipline ¶ 1503.5. The local church in *Carnes* satisfied all three of these conditions. 236 Ga., at 39, 222 S. E. 2d, at 328.

III

The only question presented by this case is which faction of the formerly united Vineville congregation is entitled to possess and enjoy the property located at 2193 Vineville Avenue in Macon, Ga. There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively. *Presbyterian Church I*, 393 U. S., at 445.

It is also clear, however, that "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Id.*, at 449. Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U. S. 696, 710 (1976); *Maryland & Va. Churches* v. *Sharpsburg Church*, 396 U. S. 367, 368 (1970); *Presbyterian Church I*, 393 U. S., at 449. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. *Serbian Orthodox Diocese*, 426 U. S., at 724–725; cf. *Watson* v. *Jones*, 13 Wall. 679, 733–734 (1872). Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Maryland & Va. Churches*, 396 U. S., at 368 (BRENNAN, J., concurring) (emphasis in original).

At least in general outline, we think the "neutral principles of law" approach is consistent with the foregoing constitutional principles. The neutral-principles approach was ap-

proved in *Maryland & Va. Churches, supra,* an appeal from a judgment of the Court of Appeals of Maryland settling a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. Finding that this analysis entailed "no inquiry into religious doctrine," the Court dismissed the appeal for want of a substantial federal question. 396 U. S., at 368. "Neutral principles of law" also received approving reference in *Presbyterian Church I,* 393 U. S., at 449; in MR. JUSTICE BRENNAN'S concurrence in *Maryland & Va. Churches,* 396 U. S., at 370; and in *Serbian Orthodox Diocese,* 426 U. S., at 723 n. 15.[3]

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization

[3] Indeed, even in *Watson* v. *Jones,* a common-law decision heavily relied upon by the dissent, Mr. Justice Miller, in speaking for the Court, stated that, regardless of the form of church government, it would be the "obvious duty" of a civil tribunal to enforce the "express terms" of a deed, will, or other instrument of church property ownership. 13 Wall., at 722–723.

can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members.

This is not to say that the application of the neutral-principles approach is wholly free of difficulty. The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body. *Serbian Orthodox Diocese,* 426 U. S., at 709.

On balance, however, the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application. These problems, in addition, should be gradually eliminated as recognition is given to the obligation of "States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." *Presbyterian Church I,* 393 U. S., at 449. We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.

The dissent would require the States to abandon the neutral-principles method, and instead would insist as a matter of constitutional law that whenever a dispute arises over the

ownership of church property, civil courts must defer to the "authoritative resolution of the dispute within the church itself." *Post,* at 614. It would require, first, that civil courts review ecclesiastical doctrine and polity to determine where the church has "placed ultimate authority over the use of the church property." *Post,* at 619. After answering this question, the courts would be required to "determine whether the dispute has been resolved within that structure of government and, if so, what decision has been made." *Post,* at 619 n. 6. They would then be required to enforce that decision. We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.

The dissent suggests that a rule of compulsory deference would somehow involve less entanglement of civil courts in matters of religious doctrine, practice, and administration. Under its approach, however, civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association." *Post,* at 619–620. In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity." *Serbian Orthodox Diocese,* 426 U. S., at 723. The neutral-principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes.

The dissent also argues that a rule of compulsory deference is necessary in order to protect the free exercise rights "of

those who have formed the association and submitted themselves to its authority." *Post*, at 618. This argument assumes that the neutral-principles method would somehow frustrate the free-exercise rights of the members of a religious association. Nothing could be further from the truth. The neutral-principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.[4]

IV

It remains to be determined whether the Georgia neutral-principles analysis was constitutionally applied on the facts of this case. Although both the trial court and the Supreme Court of Georgia viewed the case as involving nothing more than an application of the principles developed in *Presbyterian Church II* and in *Carnes*, the present case contains a significant complicating factor absent in each of those earlier cases. *Presbyterian Church II* and *Carnes* each involved a

[4] Given that the Georgia Supreme Court clearly enunciated its intent to follow the neutral-principles analysis in *Presbyterian Church II* and *Carnes*, this case does not involve a claim that retroactive application of a neutral-principles approach infringes free-exercise rights.

church property dispute between the general church and the entire local congregation. Here, the local congregation was itself divided between a majority of 164 members who sought to withdraw from the PCUS, and a minority of 94 members who wished to maintain the affiliation. Neither of the state courts alluded to this problem, however; each concluded without discussion or analysis that the title to the property was in the local church and that the local church was represented by the majority rather than the minority.

Petitioners earnestly submit that the question of which faction is the true representative of the Vineville church is an ecclesiastical question that cannot be answered by a civil court. At least, it is said, it cannot be answered by a civil court in a case involving a hierarchical church, like the PCUS, where a duly appointed church commission has determined which of the two factions represents the "true congregation." Respondents, in opposition, argue in effect that the Georgia courts did no more than apply the ordinary presumption that, absent some indication to the contrary, a voluntary religious association is represented by a majority of its members.

If in fact Georgia has adopted a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means, we think this would be consistent with both the neutral-principles analysis and the First Amendment. Majority rule is generally employed in the governance of religious societies. See *Bouldin* v. *Alexander,* 15 Wall. 131 (1872). Furthermore, the majority faction generally can be identified without resolving any question of religious doctrine or polity. Certainly, there was no dispute in the present case about the identity of the duly enrolled members of the Vineville church when the dispute arose, or about the fact that a quorum was present, or about the final vote. Most importantly, any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate

charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it. Indeed, the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy.[5]

Neither the trial court nor the Supreme Court of Georgia, however, explicitly stated that it was adopting a presumptive rule of majority representation.[6] Moreover, there are at least some indications that under Georgia law the process of identifying the faction that represents the Vineville church involves considerations of religious doctrine and polity. Georgia law requires that "church property be held according to the terms of the church government," and provides that a local church affiliated with a hierarchical religious association "is part of the whole body of the general church and is subject to the higher authority of the organization and its laws and regulations." *Carnes* v. *Smith,* 236 Ga., at 33, 38, 222 S. E. 2d, at

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[5] If the Georgia Supreme Court adopts a rule of presumptive majority representation on remand, then it should also specify how, under Georgia law, that presumption may be overcome. Because these critical issues of state law remain undetermined, we, unlike the dissent, express no view as to the ultimate outcome of the controversy if the Georgia Supreme Court adopts a presumptive rule of majority representation.

[6] The Georgia Code contains the following provision dealing with the identity of a religious corporation:

"The majority of those who adhere to its organization and doctrines represent the church. The withdrawal by one part of a congregation from the original body, or uniting with another church or denomination, is a relinquishment of all rights in the church abandoned." Ga. Code § 22-5504 (1978).

The trial court noted that the defendants (respondents here) did not claim any right of possession of the Vineville church property under this section. App. to Pet. for Cert. 6a. The Georgia Supreme Court did not mention the provision.

325, 328; see Ga. Code §§ 22–5507, 22–5508 (1978). All this may suggest that the identity of the "Vineville Presbyterian Church" named in the deeds must be determined according to terms of the Book of Church Order, which sets out the laws and regulations of churches affiliated with the PCUS. Such a determination, however, would appear to require a civil court to pass on questions of religious doctrine,[7] and to usurp the function of the commission appointed by the Presbytery, which already has determined that petitioners represent the "true congregation" of the Vineville church. Therefore, if Georgia law provides that the identity of the Vineville church is to be determined according to the "laws and regulations" of the PCUS, then the First Amendment requires that the Georgia courts give deference to the presbyterial commission's determination of that church's identity.[8]

This Court, of course, does not declare what the law of Georgia is. Since the grounds for the decision that respond-

[7] Issues of church doctrine and polity pervade the provisions of the Book of Church Order of the Presbyterian Church (1972) dealing with the identity of the local congregation. The local church corporation consists of "all the communing members on the active roll" of the church. *Id.*, § 6–2; App. 35. The "active roll," in turn, is composed "of those admitted to the Lord's Table who are active in the church's life and work." § 8–7; App. 38. The Session is given the power "to suspend or exclude from the Lord's Supper those found delinquent, according to the Rules of Discipline." § 15–6 (2); App. 51. See § 111–2; App. 124. The Session is subject to "the review and control" of the Presbytery, § 14–5; App. 49, as a part of the Presbytery's general authority to "order whatever pertains to the spiritual welfare of the churches under its care." § 16–7 (19); App. 56.

[8] There is no suggestion in this case that the decision of the commission was the product of "fraud" or "collusion." See *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U. S. 696, 713 (1976). In the absence of such circumstances, "the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them." *Id.*, at 709.

ents represent the Vineville church remain unarticulated, the judgment of the Supreme Court of Georgia is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join, dissenting.

This case presents again a dispute among church members over the control of a local church's property. Although the Court appears to accept established principles that I have thought would resolve this case, it superimposes on these principles a new structure of rules that will make the decision of these cases by civil courts more difficult. The new analysis also is more likely to invite intrusion into church polity forbidden by the First Amendment.

I

The Court begins by stating that "[t]his case involves a dispute over the ownership of church property," *ante*, at 597, suggesting that the concern is with legal or equitable ownership in the real property sense. But the ownership of the property of the Vineville church is not at issue. The deeds place title in the Vineville Presbyterian Church, or in trustees of that church, and none of the parties has questioned the validity of those deeds. The question actually presented is which of the factions within the local congregation has the right to control the actions of the titleholder, and thereby to control the use of the property, as the Court later acknowledges. *Ante*, at 602.

Since 1872, disputes over control of church property usually have been resolved under principles established by *Watson* v. *Jones*, 13 Wall. 679 (1872). Under the new and complex, two-stage analysis approved today, a court instead first must apply newly defined "neutral principles of law" to determine

whether property titled to the local church is held in trust for the general church organization with which the local church is affiliated. If it is, then the court will grant control of the property to the councils of the general church. If not, then control by the local congregation will be recognized. In the latter situation, if there is a schism in the local congregation, as in this case, the second stage of the new analysis becomes applicable. Again, the Court fragments the analysis into two substeps for the purpose of determining which of the factions should control the property.

As this new approach inevitably will increase the involvement of civil courts in church controversies, and as it departs from long-established precedents, I dissent.

A

The first stage in the "neutral principles of law" approach operates as a restrictive rule of evidence. A court is required to examine the deeds to the church property, the charter of the local church (if there is one), the book of order or discipline of the general church organization, and the state statutes governing the holding of church property. The object of the inquiry, where the title to the property is in the local church, is "to determine whether there [is] any basis for a trust in favor of the general church." *Ante*, at 600. The court's investigation is to be "completely secular," "rel[ying] exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges." *Ante*, at 603. Thus, where religious documents such as church constitutions or books of order must be examined "for language of trust in favor of the general church," "a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust." *Ante*, at 604. It follows that the civil courts using this analysis may consider the form of religious govern-

ment adopted by the church members for the resolution of intrachurch disputes *only* if that polity has been stated, in express relation to church property, in the language of trust and property law.[1]

One effect of the Court's evidentiary rule is to deny to the courts relevant evidence as to the religious polity—that is, the form of governance—adopted by the church members. The constitutional documents of churches tend to be drawn in terms of religious precepts. Attempting to read them "in purely secular terms" is more likely to promote confusion than understanding. Moreover, whenever religious polity has not been expressed in specific statements referring to the property

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[1] Despite the Court's assertion to the contrary, *ante*, at 602–603, this "neutral principles" approach was not approved by the Court in dismissing the appeal in *Maryland & Va. Eldership* v. *Sharpsburg Church*, 254 Md. 162, 254 A. 2d 162 (1969). 396 U. S. 367 (1970). The state court there examined the constitution of the general church, the charters of the local churches, the deeds to the property at issue, and the relevant state statutes. But it did not restrict its inquiry to a search for statements expressed in the language of trust and property law; see 254 Md., at 169–176, 254 A. 2d, at 168–170. Rather, the state court canvassed all of these sources, and others, see *Maryland & Va. Eldership* v. *Sharpsburg Church*, 249 Md. 650, 665–668, 241 A. 2d 691, 700–701 (1968), for information about the basic polity of the Church of God. Having concluded that the local congregations retained final authority over their property, it awarded judgment accordingly. Contrary to the statement of the Court in the present case that such an inquiry into church polity requires analysis of "ecclesiastical . . . doctrine," *ante*, at 605, "the Maryland court's resolution of the dispute involved no inquiry into religious doctrine." 396 U. S., at 368.

In *Presbyterian Church* v. *Hull Church*, 393 U. S. 440 (1969), "neutral principles" were referred to in passing, but were never described. *Id.*, at 449. What the Court refers to as an "approving reference" to "neutral principles" in *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U. S. 696 (1976), was only an acknowledgment in a footnote that "[n]o claim is made that the 'formal title' doctrine by which church property disputes may be decided in civil courts is to be applied in this case." *Id.*, at 723 n. 15. Nor can the Court find support for its position in *Watson* v. *Jones*, 13 Wall. 679, 724–729 (1872).

of a church, there will be no evidence of that polity cognizable under the neutral-principles rule. Lacking such evidence, presumably a court will impose some rule of church government derived from state law. In the present case, for example, the general and unqualified authority of the Presbytery over the actions of the Vineville church had not been expressed in secular terms of control of its property. As a consequence, the Georgia courts could find no acceptable evidence of this authoritative relationship, and they imposed instead a congregational form of government determined from state law.

This limiting of the evidence relative to religious government cannot be justified on the ground that it "free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Ante*, at 603. For unless the body identified as authoritative under state law resolves the underlying dispute in accord with the decision of the church's own authority, the state court effectively will have reversed the decisions of doctrine and practice made in accordance with church law. The schism in the Vineville church, for example, resulted from disagreements among the church members over questions of doctrine and practice. App. 233. Under the Book of Church Order, these questions were resolved authoritatively by the higher church courts, which then gave control of the local church to the faction loyal to that resolution. The Georgia courts, as a matter of state law, granted control to the schismatic faction, and thereby effectively reversed the doctrinal decision of the church courts. This indirect interference by the civil courts with the resolution of religious disputes within the church is no less proscribed by the First Amendment than is the direct decision of questions of doctrine and practice.[2]

[2] The neutral-principles approach appears to assume that the requirements of the Constitution will be satisfied if civil courts are forbidden to consider certain types of evidence. The First Amendment's Religion Clauses, however, are meant to protect churches and their members from civil law interference, not to protect the courts from having to decide

When civil courts step in to resolve intrachurch disputes over control of church property, they will either support or overturn the authoritative resolution of the dispute within the church itself. The new analysis, under the attractive banner of "neutral principles," actually invites the civil courts to do the latter. The proper rule of decision, that I thought had been settled until today, requires a court to give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose.

B

The Court's basic neutral-principles approach, as a means of isolating decisions concerning church property from other decisions made within the church, relies on the concept of a trust of local church property in favor of the general church. Because of this central premise, the neutral-principles rule suffices to settle only disputes between the central councils of a church organization and a unanimous local congregation. Where, as here, the neutral-principles inquiry reveals no trust in favor of the general church, and the local congregation is split into factions, the basic question remains unresolved: which faction should have control of the local church?

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difficult evidentiary questions. Thus, the evidentiary rules to be applied in cases involving intrachurch disputes over church property should be fashioned to avoid interference with the resolution of the dispute within the accepted church government. The neutral-principles approach consists instead of a rule of evidence that ensures that in some cases the courts will impose a form of church government and a doctrinal resolution at odds with that reached by the church's own authority.

The neutral-principles approach creates other difficulties. It imposes on the organization of churches additional legal requirements which in some cases might inhibit their formation by forcing the organizers to confront issues that otherwise might never arise. It also could precipitate church property disputes, for existing churches may deem it necessary, in light of today's decision, to revise their constitutional documents, charters, and deeds to include a specific statement of church polity in the language of property and trust law.

The Court acknowledges that the church law of the Presbyterian Church in the United States (PCUS), of which the Vineville church is a part, provides for the authoritative resolution of this question by the Presbytery. *Ante,* at 608–609, and n. 7. Indeed, the Court indicates that Georgia, consistently with the First Amendment, may adopt the *Watson* v. *Jones* rule of adherence to the resolution of the dispute according to church law—a rule that would necessitate reversal of the judgment for the respondents. *Ante,* at 609. But instead of requiring the state courts to take this approach, the Court approves as well an alternative rule of state law: the Georgia courts are said to be free to "adop[t] a presumptive rule of majority representation, defeasible upon a showing that the identity of the local church is to be determined by some other means." *Ante,* at 607. This showing may be made by proving that the church has "provid[ed], in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way." *Ante,* at 607–608.

On its face, this rebuttable presumption also requires reversal of the state court's judgment in favor of the schismatic faction. The polity of the PCUS commits to the Presbytery the resolution of the dispute within the local church. Having shown this structure of church government for the determination of the identity of the local congregation, the petitioners have rebutted any presumption that this question has been left to a majority vote of the local congregation.

The Court nevertheless declines to order reversal. Rather than decide the case here in accordance with established First Amendment principles, the Court leaves open the possibility that the state courts might adopt some restrictive evidentiary rule that would render the petitioners' evidence inadequate to overcome the presumption of majority control. *Ante,* at 608 n. 5. But, aside from a passing reference to the use of the neutral-principles approach developed earlier in its

opinion,[3] the Court affords no guidance as to the constitutional limitations on such an evidentiary rule; the state courts, it says, are free to adopt any rule that is constitutional.

> "Indeed, the state may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." *Ante,* at 608.

In essence, the Court's instructions on remand therefore allow the state courts the choice of following the long-settled rule of *Watson* v. *Jones* or of adopting some other rule—unspecified by the Court—that the state courts view as consistent with the First Amendment. Not only questions of state law but also important issues of federal constitutional law thus are left to the state courts for their decision, and, if they depart from *Watson* v. *Jones,* they will travel a course left totally uncharted by this Court.

II

Disputes among church members over the control of church property arise almost invariably out of disagreements regarding doctrine and practice. Because of the religious nature of these disputes, civil courts should decide them according to principles that do not interfere with the free exercise of religion in accordance with church polity and doctrine. *Serbian*

[3] *Ante,* at 607–608. Such a use would be an extension of this restrictive rule of evidence, and one likely to exacerbate further the interference with free religious exercise. See *supra,* at 612–614. Not only will a local congregation of a general hierarchical church be treated as an independent congregational church *unless* the rules of church government have been expressed in specified documents with explicit reference to church property, in addition, all local congregations will be regarded as having a rule of majority control *unless* they have related their general voting rules explicitly to disputes about church property. As a consequence, the resolution of doctrinal disputes within the polity chosen by the church members often will be overturned by the civil courts, an interference with religious exercise that cannot be squared with the First Amendment.

Orthodox Diocese v. *Milivojevich*, 426 U. S. 696, 709, 720 (1976); *Presbyterian Church* v. *Hull Church*, 393 U. S. 440, 445–446, 449 (1969); *Kedroff* v. *Saint Nicholas Cathedral*, 344 U. S. 94, 107 (1952); *id.*, at 121–122 (Frankfurter, J., concurring). See also *Kreshik* v. *Saint Nicholas Cathedral*, 363 U. S. 190 (1960); *Maryland & Va. Eldership* v. *Sharpsburg Church*, 254 Md. 162, 254 A. 2d 162 (1969), appeal dismissed for want of substantial federal question, 396 U. S. 367 (1970). The only course that achieves this constitutional requirement is acceptance by civil courts of the decisions reached within the polity chosen by the church members themselves. The classic statement of this view is found in *Watson* v. *Jones*, 13 Wall., at 728–729: [4]

> "The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious

[4] *Watson* v. *Jones* was decided at a time when the First Amendment was not considered to be applicable to the States through the Fourteenth Amendment, and before *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), made state law applicable in diversity cases. But beginning with *Kedroff* v. *Saint Nicholas Cathedral*, 344 U. S., at 116, this Court has indicated repeatedly that the principles of general federal law announced in *Watson* v. *Jones* are now regarded as rooted in the First Amendment, and are applicable to the States through the Fourteenth Amendment. *Presbyterian Church* v. *Hull Church*, 393 U. S., at 447–448; *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U. S., at 710–711.

> unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."

Accordingly, in each case involving an intrachurch dispute—including disputes over church property—the civil court must focus directly on ascertaining, and then following, the decision made within the structure of church governance. By doing so, the court avoids two equally unacceptable departures from the genuine neutrality mandated by the First Amendment. First, it refrains from direct review and revision of decisions of the church on matters of religious doctrine and practice that underlie the church's determination of intrachurch controversies, including those that relate to control of church property.[5] Equally important, by recognizing the authoritative resolution reached within the religious association, the civil court avoids interfering indirectly with the religious governance of those who have formed the association and submitted themselves to its authority. See *supra*, at 612–614; *Watson* v. *Jones*, *supra*, at 728–729; *Kedroff* v. *Saint Nicholas Cathedral*, *supra*, at 107–110.

III

Until today, and under the foregoing authorities, the first question presented in a case involving an intrachurch dispute over church property was where within the religious associa-

[5] Thus, in *Presbyterian Church* v. *Hull Church*, *supra*, the Court forbade the use of the "English approach" in the resolution of church property disputes because it requires the civil courts to determine whether authoritative decisions of doctrine and practice are consistent with the longstanding tenets of faith of a particular church. 393 U. S., at 449–450; accord, *Watson* v. *Jones*, 13 Wall., at 727–729. Similarly, in *Serbian Orthodox Diocese* v. *Milivojevich*, *supra*, the control of church property turned on the resolution of questions of doctrine and practice, "which under our cases is [only] for ecclesiastical and not civil tribunals." 426 U. S., at 709; see *id.*, at 720.

tion the rules of polity, accepted by its members before the schism, had placed ultimate authority over the use of the church property.[6] The courts, in answering this question have recognized two broad categories of church government. One is congregational, in which authority over questions of church doctrine, practice, and administration rests entirely in the local congregation or some body within it. In disputes over the control and use of the property of such a church, the civil courts enforce the authoritative resolution of the controversy within the local church itself. *Watson* v. *Jones, supra*, at 724–726. The second is hierarchical, in which the local church is but an integral and subordinate part of a larger church and is under the authority of the general church. Since the decisions of the local congregation are subject to review by the tribunals of the church hierarchy, this Court has held that the civil courts must give effect to the duly made decisions of the highest body within the hierarchy that has considered the dispute. As we stated in *Serbian Orthodox Diocese* v. *Milivojevich:*

> "[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution *requires* that civil courts accept their decisions as binding upon them." 426 U. S., at 724–725 (emphasis added).[7]

A careful examination of the constitutions of the general

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[6] After answering this question, of course, the civil court must determine whether the dispute has been resolved within that structure of government and, if so, what decision has been made.

[7] Accord, *Kedroff* v. *Saint Nicholas Cathedral, supra*, at 113–114; *Watson* v. *Jones, supra*, at 727.

and local church, as well as other relevant documents, may be necessary to ascertain the form of governance adopted by the members of the religious association. But there is no reason to restrict the courts to statements of polity related directly to church property. For the constitutionally necessary limitations are imposed not on the evidence to be considered but instead on the object of the inquiry, which is both limited and clear: the civil court must determine whether the local church remains autonomous, so that its members have unreviewable authority to withdraw it (and its property) from the general church, or whether the local church is inseparably integrated into and subordinate to the general church.[8]

IV

The principles developed in prior decisions thus afford clear guidance in the case before us. The Vineville church is presbyterian, a part of the PCUS. The presbyterian form of church government, adopted by the PCUS, is "a hierarchical structure of tribunals which consists of, in ascending order, (1) the Church Session, composed of the elders of the local church; (2) the Presbytery, composed of several churches in a geographical area; (3) the Synod, generally composed of all Presbyteries within a State; and (4) the General Assembly, the highest governing body." *Presbyterian Church* v. *Hull*

[8] See Kauper, Church Autonomy and the First Amendment: the Presbyterian Church Case, in Church and State: The Supreme Court and the First Amendment 90–92, 97–98 (P. Kurland ed. 1975). The Court suggests that the careful consideration of church constitutions and other relevant documents as a prerequisite to deciding basic questions of church polity may be impermissible if it requires a "searching . . . inquiry into church polity." *Ante*, at 605, quoting *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U. S., at 723. The issue in *Serbian Orthodox Diocese*, however, was quite different. There, the hierarchical polity of the church was clear. *Id.*, at 715–717. What the Court held impermissible was the state court's further inquiry into the faithfulness of the church hierarchy's decisions to the detailed provisions of church law. *Id.*, at 712–713, 718, 721–723; *id.*, at 725 (WHITE, J., concurring).

Church, 393 U. S., at 442. The Book of Church Order subjects the Session to "review and control" by the Presbytery in all matters, even authorizing the Presbytery to replace the leadership of the local congregation, to winnow its membership, and to take control of it. No provision of the Book of Church Order gives the Session the authority to withdraw the local church from the PCUS; similarly, no section exempts such a decision by the local church from review by the Presbytery.

Thus, while many matters, including the management of the church property, are committed in the first instance to the Session and congregation of the local church, their actions are subject to review by the Presbytery. Here, the Presbytery exercised its authority over the local church, removing the dissidents from church office, asserting direct control over the government of the church, and recognizing the petitioners as the legitimate congregation and Session of the church. It is undisputed that under the established government of the Presbyterian Church—accepted by the members of the church before the schism—the use and control of the church property have been determined authoritatively to be in the petitioners. Accordingly, under the principles I have thought were settled, there is no occasion for the further examination of the law of Georgia that the Court directs. On remand, the Georgia courts should be directed to enter judgment for the petitioners.

BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 78–329. Argued February 27, 1979—Decided July 2, 1979*

A Massachusetts statute requires parental consent before an abortion can be performed on an unmarried woman under the age of 18. If one or both parents refuse such consent, however, the abortion may be obtained by order of a judge of the superior court "for good cause shown." In appellees' class action challenging the constitutionality of the statute, a three-judge District Court held it unconstitutional. Subsequently, this Court vacated the District Court's judgment, *Bellotti* v. *Baird*, 428 U. S. 132, holding that the District Court should have abstained and certified to the Massachusetts Supreme Judicial Court appropriate questions concerning the meaning of the statute. On remand, the District Court certified several questions to the Supreme Judicial Court. Among the questions certified was whether the statute permits any minors—mature or immature—to obtain judicial consent to an abortion without any parental consultation whatsoever. The Supreme Judicial Court answered that, in general, it does not; that consent must be obtained for every nonemergency abortion unless no parent is available; and that an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion. Another question certified was whether, if the superior court finds that the minor is capable of making, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, the court may refuse its consent on a finding that a parent's, or its own, contrary decision is a better one. The Supreme Judicial Court answered in the affirmative. Following the Supreme Judicial Court's judgment, the District Court again declared the statute unconstitutional and enjoined its enforcement.

Held: The judgment is affirmed. Pp. 633–651; 652–656.

450 F. Supp. 997, affirmed.

MR. JUSTICE POWELL, joined by MR. CHIEF JUSTICE BURGER, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, concluded that:

1. There are three reasons justifying the conclusion that the consti-

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*Together with No. 78–330, *Hunerwadel* v. *Baird et al.*, also on appeal from the same court.

tutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the guiding role of parents in the upbringing of their children. Pp. 633–639.

2. The abortion decision differs in important ways from other decisions facing minors, and the State is required to act with particular sensitivity when it legislates to foster parental involvement in this matter. Pp. 639–642.

3. If a State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained. A pregnant minor is entitled in such a proceeding to show either that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes, or that even if she is not able to make this decision independently, the desired abortion would be in her best interests. Such a procedure must ensure that the provision requiring parental consent does not in fact amount to an impermissible "absolute, and possibly arbitrary, veto." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 74. Pp. 642–644.

4. The Massachusetts statute, as authoritatively interpreted by the Supreme Judicial Court, unduly burdens the right to seek an abortion. The statute falls short of constitutional standards in two respects. First, it permits judicial authorization for an abortion to be withheld from a minor who is found by the superior court to be mature and fully competent to make this decision independently. Second, it requires parental consultation or notification in every instance, whether or not in the pregnant minor's best interests, without affording her an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests. Pp. 644–651.

MR. JUSTICE STEVENS, joined by MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded that the Massachusetts statute is unconstitutional because under the statute, as written and as construed by the Massachusetts Supreme Judicial Court, no minor, no matter how mature and capable of informed decisionmaking, may receive an abortion without the consent of either both parents or a superior court judge, thus making the minor's abortion decision subject in every instance to an absolute third-party veto. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, controlling. Pp. 652–656.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined.

REHNQUIST, J., filed a concurring opinion, *post*, p. 651. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 652. WHITE, J., filed a dissenting opinion, *post*, p. 656.

Garrick F. Cole, Assistant Attorney General of Massachusetts, argued the cause for appellants in No. 78–329. With him on the briefs were *Francis X. Bellotti*, Attorney General, *pro se*, and *Michael B. Meyer* and *Thomas R. Kiley*, Assistant Attorneys General. *Brian A. Riley* argued the cause for appellant in No. 78–330. With him on the brief was *Thomas P. Russell*.

Joseph J. Balliro argued the cause for appellees in both cases. With him on the brief was *Joan C. Schmidt*. *John H. Henn* also argued the cause for appellees in both cases. With him on the brief were *Scott C. Moriearty*, *Sandra L. Lynch*, *Loyd M. Starrett*, and *John Reinstein*.†

MR. JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST joined.

These appeals present a challenge to the constitutionality of a state statute regulating the access of minors to abortions. They require us to continue the inquiry we began in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), and *Bellotti* v. *Baird*, 428 U. S. 132 (1976).

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†*Stuart D. Hubbell* and *Robert A. Destro* filed a brief for the Catholic League for Religious and Civil Rights et al. as *amici curiae* urging reversal in No. 78–329.

Eve W. Paul, *Harriet F. Pilpel*, and *Sylvia A. Law* filed a brief for the Planned Parenthood Federation of America, Inc., et al. as *amici curiae* urging affirmance in both cases.

Briefs of *amici curiae* were filed by *Victor G. Rosenblum*, *Dennis J. Horan*, and *John D. Gorby* in both cases for Americans United for Life, Inc., et al.; and by *George E. Reed* and *Patrick F. Geary* in No. 78–329 for the United States Catholic Conference.

I

A

On August 2, 1974, the Legislature of the Commonwealth of Massachusetts passed, over the Governor's veto, an Act pertaining to abortions performed within the State. 1974 Mass. Acts, ch. 706. According to its title, the statute was intended to regulate abortions "within present constitutional limits." Shortly before the Act was to go into effect, the class action from which these appeals arise was commenced in the District Court [1] to enjoin, as unconstitutional, the provision of the Act now codified as Mass. Gen. Laws Ann., ch. 112, § 12S (West Supp. 1979).[2]

Section 12S provides in part:

> "If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents [to an abortion to be performed on the mother] is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other

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[1] The court promptly issued a restraining order which remained in effect until its decision on the merits. Subsequent stays of enforcement were issued during the complex course of this litigation, with the result that Mass. Gen. Laws Ann., ch. 112, § 12S (West Supp. 1979), never has been enforced by Massachusetts.

[2] As originally enacted, § 12S was designated as § 12P of chapter 112. In 1977, the provision was renumbered as § 12S, and the numbering of subdivisions within the section was eliminated. No changes of substance were made. We shall refer to the section as § 12S throughout this opinion.

> person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files."

Physicians performing abortions in the absence of the consent required by § 12S are subject to injunctions and criminal penalties. See Mass. Gen. Laws Ann., ch. 112, §§ 12Q, 12T, and 12U (West Supp. 1979).

A three-judge District Court was convened to hear the case pursuant to 28 U. S. C. § 2281 (1970 ed.), repealed by Pub. L. 94–381, § 1, 90 Stat. 1119.[3] Plaintiffs in the suit, appellees in both the cases before us now, were William Baird; Parents Aid Society, Inc. (Parents Aid), of which Baird is founder and director; Gerald Zupnick, M. D., who regularly performs abortions at the Parents Aid clinic; and an unmarried minor, identified by the pseudonym "Mary Moe," who, at the commencement of the suit, was pregnant, residing at home with her parents, and desirous of obtaining an abortion without informing them.[4]

Mary Moe was permitted to represent the "class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent [to abortion], and who do not wish to involve their parents." *Baird* v. *Bellotti,* 393 F. Supp. 847, 850 (Mass. 1975) (*Baird I*). Initially there was some confusion whether the rights of minors who wish abortions without parental involvement but who lack "adequate capacity" to give such consent also could be adjudicated in

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[3] The proceedings before the court and the substance of its opinion are described in detail in *Bellotti* v. *Baird,* 428 U. S. 132, 136–143 (1976).

[4] Three other minors in similar circumstances were named in the complaint, but the complaint was dismissed as to them for want of proof of standing. That decision has not been challenged on appeal.

the suit. The District Court ultimately determined that Dr. Zupnick was entitled to assert the rights of these minors. See *Baird* v. *Bellotti*, 450 F. Supp. 997, 1001, and n. 6 (Mass. 1978).[5]

Planned Parenthood League of Massachusetts and Crittenton Hastings House & Clinic, both organizations that provide counseling to pregnant adolescents, and Phillip Stubblefield, M. D. (intervenors),[6] appeared as *amici curiae* on behalf of the plaintiffs. The District Court "accepted [this group] in a status something more than *amici* because of reservations about the adequacy of plaintiffs' representation [of the plaintiff classes in the suit]." *Id.*, at 999 n. 3.

Defendants in the suit, appellants here in No. 78–329, were the Attorney General of Massachusetts and the District Attorneys of all counties in the State. Jane Hunerwadel was permitted to intervene as a defendant and representative of the class of Massachusetts parents having unmarried minor daughters who then were, or might become, pregnant. She and the class she represents are appellants in No. 78–330.[7]

Following three days of testimony, the District Court issued an opinion invalidating § 12S. *Baird I*, *supra*. The court rejected appellees' argument that all minors capable of becoming pregnant also are capable of giving informed consent

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[5] Appellants argue that these "immature" minors never were before the District Court and that the court's remedy should have been tailored to grant relief only to the class of "mature" minors. It is apparent from the District Court's opinions, however, that it considered the constitutionality of § 12S as applied to all pregnant minors who might be affected by it. We accept that the rights of this entire category of minors properly were subject to adjudication.

[6] In 1978, the District Court permitted postjudgment intervention by these parties, who now appear jointly before this Court as intervenor-appellees.

[7] As their positions are closely aligned, if not identical, appellants in Nos. 78–329 and 78–330 are hereinafter referred to collectively as appellants.

to an abortion, or that it always is in the best interests of a minor who desires an abortion to have one. See 393 F. Supp., at 854. But the court was convinced that "a substantial number of females under the age of 18 are capable of forming a valid consent," *id.*, at 855, and "that a significant number of [these] are unwilling to tell their parents." *Id.*, at 853.

In its analysis of the relevant constitutional principles, the court stated that "there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age." *Id.*, at 855–856. The court found no justification for the parental consent limitation placed on that right by § 12S, since it concluded that the statute was "cast not in terms of protecting the minor, . . . but in recognizing independent rights of parents." *Id.*, at 856. The "independent" parental rights protected by § 12S, as the court understood them, were wholly distinct from the best interests of the minor.[8]

B

Appellants sought review in this Court, and we noted probable jurisdiction. *Bellotti* v. *Baird*, 423 U. S. 982 (1975). After briefing and oral argument, it became apparent that § 12S was susceptible of a construction that "would avoid or substantially modify the federal constitutional challenge to the statute." *Bellotti* v. *Baird*, 428 U. S. 132, 148 (1976) (*Bellotti I*). We therefore vacated the judgment of the District Court, concluding that it should have abstained and certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12S, pursuant to exist-

[8] One member of the three-judge court dissented, arguing that the decision of the majority to allow Mary Moe to proceed in the case without notice to her parents denied them their parental rights without due process of law, and that § 12S was consistent with the decisions of this Court recognizing the propriety of parental control over the conduct of children. See 393 F. Supp., at 857–865.

ing procedure in that State. See Mass. Sup. Jud. Ct. Rule 3:21.

On remand, the District Court certified nine questions to the Supreme Judicial Court.[9] These were answered in an

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[9] The nine questions certified by the District Court, with footnotes omitted, are as follows:

"1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?

"a) Is the parent to consider 'exclusively . . . what will serve the child's best interest'?

"b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the 'long-term consequences to the family and her parents' marriage relationship'?

"c) Other?

"2. What standard or standards is the superior court to apply?

"a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

"b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?

"c) Other?

"3. Does the Massachusetts law permit a minor (a) 'capable of giving informed consent,' or (b) 'incapable of giving informed consent,' 'to obtain [a court] order without parental consultation'?

"4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification?

"5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, [§ 12S] which will expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?

"6. To what degree do the standards and procedures set forth in c. 112, § 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, [§ 12S]?

"7. May a minor, upon a showing of indigency, have court-appointed counsel?

"8. Is it a defense to his criminal prosecution if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably,

opinion styled *Baird* v. *Attorney General*, 371 Mass. 741, 360 N. E. 2d 288 (1977) (*Attorney General*). Among the more important aspects of § 12S, as authoritatively construed by the Supreme Judicial Court, are the following:

1. In deciding whether to grant consent to their daughter's abortion, parents are required by § 12S to consider exclusively what will serve her best interests. See *id.*, at 746–747, 360 N. E. 2d, at 292–293.

2. The provision in § 12S that judicial consent for an abortion shall be granted, parental objections notwithstanding, "for good cause shown" means that such consent shall be granted if found to be in the minor's best interests. The judge "must disregard all parental objections, and other considerations, which are not based exclusively" on that standard. *Id.*, at 748, 360 N. E. 2d, at 293.

3. Even if the judge in a § 12S proceeding finds "that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion," he is entitled to withhold consent "in circumstances where he determines that the best interests of the minor will not be served by an abortion." *Ibid.*, 360 N. E. 2d, at 293.

4. As a general rule, a minor who desires an abortion may not obtain judicial consent without first seeking both parents' consent. Exceptions to the rule exist when a parent is not available or when the need for the abortion constitutes " 'an emergency requiring immediate action.' " [10] *Id.*, at 750, 360 N. E. 2d, at 294. Unless a parent is not available, he must be notified of any judicial proceedings brought under § 12S. *Id.*, at 755–756, 360 N. E. 2d, at 297.

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and in good faith, though erroneously, believed that she was eighteen or more years old or had been married?

"9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?"

[10] Section 12S itself dispenses with the need for the consent of any parent who "has died or has deserted his or her family."

5. The resolution of § 12S cases and any appeals that follow can be expected to be prompt. The name of the minor and her parents may be held in confidence. If need be, the Supreme Judicial Court and the superior courts can promulgate rules or issue orders to ensure that such proceedings are handled expeditiously. *Id.*, at 756–758, 360 N. E. 2d, at 297–298.

6. Massachusetts Gen. Laws Ann., ch. 112, § 12F (West Supp. 1979), which provides, *inter alia*, that certain classes of minors may consent to most kinds of medical care without parental approval, does not apply to abortions, except as to minors who are married, widowed, or divorced. See 371 Mass., at 758–762, 360 N. E. 2d, at 298–300. Nor does the State's common-law "mature minor rule" create an exception to § 12S. *Id.*, at 749–750, 360 N. E. 2d, at 294. See n. 27, *infra*.

C

Following the judgment of the Supreme Judicial Court, appellees returned to the District Court and obtained a stay of the enforcement of § 12S until its constitutionality could be determined. *Baird* v. *Bellotti*, 428 F. Supp. 854 (Mass. 1977) (*Baird II*). After permitting discovery by both sides, holding a pretrial conference, and conducting further hearings, the District Court again declared § 12S unconstitutional and enjoined its enforcement. *Baird* v. *Bellotti*, 450 F. Supp. 997 (Mass. 1978) (*Baird III*). The court identified three particular aspects of the statute which, in its view, rendered it unconstitutional.

First, as construed by the Supreme Judicial Court, § 12S requires parental notice in virtually every case where the parent is available. The court believed that the evidence warranted a finding "that many, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger." *Id.*, at 1001. In addition, the court concluded that it would not be in

the best interests of some "immature" minors—those incapable of giving informed consent—even to inform their parents of their intended abortions. Although the court declined to decide whether the burden of requiring a minor to take her parents to court was, *per se*, an impermissible burden on her right to seek an abortion, it concluded that Massachusetts could not constitutionally insist that parental permission be sought or notice given "in those cases where a court, if given free rein, would find that it was to the minor's best interests that one or both of her parents not be informed . . . ." *Id.*, at 1002.

Second, the District Court held that § 12S was defective in permitting a judge to veto the abortion decision of a minor found to be capable of giving informed consent. The court reasoned that upon a finding of maturity and informed consent, the State no longer was entitled to impose legal restrictions upon this decision. *Id.*, at 1003. Given such a finding, the court could see "no reasonable basis" for distinguishing between a minor and an adult, and it therefore concluded that § 12S was not only "an undue burden in the due process sense, [but] a discriminatory denial of equal protection [as well]." *Id.*, at 1004.

Finally, the court decided that § 12S suffered from what it termed "formal overbreadth," *ibid.*, because the statute failed explicitly to inform parents that they must consider only the minor's best interests in deciding whether to grant consent. The court believed that, despite the Supreme Judicial Court's construction of § 12S, parents naturally would infer from the statute that they were entitled to withhold consent for other, impermissible reasons. This was thought to create a "chilling effect" by enhancing the possibility that parental consent would be denied wrongfully and that the minor would have to proceed in court.

Having identified these flaws in § 12S, the District Court considered whether it should engage in "judicial repair." *Id.*, at 1005. It declined either to sever the statute or to give

it a construction different from that set out by the Supreme Judicial Court, as that tribunal arguably had invited it to do. See *Attorney General,* 371 Mass., at 745–746, 360 N. E. 2d, at 292. The District Court therefore adhered to its previous position, declaring § 12S unconstitutional and permanently enjoining its enforcement.[11] Appellants sought review in this Court a second time, and we again noted probable jurisdiction. 439 U. S. 925 (1978).

II

A child, merely on account of his minority, is not beyond the protection of the Constitution. As the Court said in *In re Gault,* 387 U. S. 1, 13 (1967), "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." [12] This observation, of course, is but the beginning of the analysis. The Court long has recognized that the status of minors under the law is unique in many respects. As Mr. Justice Frankfurter aptly put it: "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination

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[11] The dissenting judge agreed that the State could not permit a judge to override the decision of a minor found to be mature and capable of giving informed consent to an abortion. He disagreed with the remainder of the court's conclusions: the best-interests limitation on the withholding of parental consent in the Supreme Judicial Court's opinion, he argued, must be treated as if part of the statutory language itself; and he read the evidentiary record as proving that only rarely would a pregnant minor's interests be disserved by consulting with her parents about a desired abortion. He also noted the value to a judge in a § 12S proceeding of having the parents before him as a source of evidence as to the minor's maturity and what course would serve her best interests. See *Baird III,* 450 F. Supp., at 1006–1020.

[12] Similarly, the Court said in *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52, 74 (1976):

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."

of a State's duty towards children." *May* v. *Anderson*, 345 U. S. 528, 536 (1953) (concurring opinion). The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural," *Moore* v. *East Cleveland*, 431 U. S. 494, 503–504 (1977) (plurality opinion), requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

A

The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult. For example, the Court has held that the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings. *In re Gault, supra.* In particular, minors involved in such proceedings are entitled to adequate notice, the assistance of counsel, and the opportunity to confront their accusers. They can be found guilty only upon proof beyond a reasonable doubt, and they may assert the privilege against compulsory self-incrimination. *In re Winship*, 397 U. S. 358 (1970); *In re Gault, supra.* See also *Ingraham* v. *Wright*, 430 U. S. 651, 674 (1977) (corporal punishment of schoolchildren implicates constitutionally protected liberty interest); cf. *Breed* v. *Jones*, 421 U. S. 519 (1975) (Double Jeopardy Clause prohibits prosecuting juvenile as an adult after an adjudicatory finding in juvenile court that he had violated a criminal statute).

Similarly, in *Goss* v. *Lopez,* 419 U. S. 565 (1975), the Court held that children may not be deprived of certain property interests without due process.

These rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults. Indeed, our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults. In order to preserve this separate avenue for dealing with minors, the Court has said that hearings in juvenile delinquency cases need not necessarily " 'conform with all of the requirements of a criminal trial or even of the usual administrative hearing.' " *In re Gault, supra,* at 30, quoting *Kent* v. *United States,* 383 U. S. 541, 562 (1966). Thus, juveniles are not constitutionally entitled to trial by jury in delinquency adjudications. *McKeiver* v. *Pennsylvania,* 403 U. S. 528 (1971). Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for "concern, . . . sympathy, and . . . paternal attention." *Id.,* at 550 (plurality opinion).

B

Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.[13]

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[13] As MR. JUSTICE STEWART wrote of the exercise by minors of the First Amendment rights that "secur[e] . . . the liberty of each man to

Ginsberg v. *New York*, 390 U. S. 629 (1968), illustrates well the Court's concern over the inability of children to make mature choices, as the First Amendment rights involved are clear examples of constitutionally protected freedoms of choice. At issue was a criminal conviction for selling sexually oriented magazines to a minor under the age of 17 in violation of a New York state law. It was conceded that the conviction could not have stood under the First Amendment if based upon a sale of the same material to an adult. *Id.*, at 634. Notwithstanding the importance the Court always has attached to First Amendment rights, it concluded that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ,'" *id.*, at 638, quoting *Prince* v. *Massachusetts*, 321 U. S. 158, 170 (1944).[14] The Court was convinced that the New York Legislature rationally could conclude that the sale to children of the magazines in question presented a danger against which they should be guarded. *Ginsberg, supra*, at 641. It therefore rejected the

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decide for himself what he will read and to what he will listen," *Ginsberg* v. *New York*, 390 U. S. 629, 649 (1968) (concurring in result):

"[A]t least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults." *Id.*, at 649–650 (footnotes omitted).

[14] In *Prince* an adult had permitted a child in her custody to sell religious literature on a public street in violation of a state child-labor statute. The child had been permitted to engage in this activity upon her own sincere request. 321 U. S., at 162. In upholding the adult's conviction under the statute, we found that "the interests of society to protect the welfare of children" and to give them "opportunities for growth into free and independent well-developed men and citizens," *id.*, at 165, permitted the State to enforce its statute, which "[c]oncededly . . . would be invalid," *id.*, at 167, if made applicable to adults.

argument that the New York law violated the constitutional rights of minors.[15]

C

Third, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.[16] But an additional and more important justification for state deference to parental control over children is that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925). "The duty to prepare the child for 'additional obligations' . . .

[15] Although the State has considerable latitude in enacting laws affecting minors on the basis of their lesser capacity for mature, affirmative choice, *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969), illustrates that it may not arbitrarily deprive them of their freedom of action altogether. The Court held in *Tinker* that a schoolchild's First Amendment freedom of expression entitled him, contrary to school policy, to attend school wearing a black armband as a silent protest against American involvement in the hostilities in Vietnam. The Court acknowledged that the State was permitted to prohibit conduct otherwise shielded by the Constitution that "for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.*, at 513. It upheld the First Amendment right of the schoolchildren in that case, however, not only because it found no evidence in the record that their wearing of black armbands threatened any substantial interference with the proper objectives of the school district, but also because it appeared that the challenged policy was intended primarily to stifle any debate whatsoever—even nondisruptive discussions—on important political and moral issues. See *id.*, at 510.

[16] See, *e. g.*, Mass. Gen. Laws Ann., ch. 207, §§ 7, 24, 25, 33, 33A (West 1958 and Supp. 1979) (parental consent required for marriage of person under 18); Mass. Gen. Laws Ann., ch. 119, § 55A (West Supp. 1979) (waiver of counsel by minor in juvenile delinquency proceedings must be made through parent or guardian).

must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin* v. *Yoder*, 406 U. S. 205, 233 (1972). This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.

We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither supply nor hinder.*" *Prince* v. *Massachusetts, supra,* at 166 (emphasis added).

Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood. While we do not pretend any special wisdom on this subject, we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg* v. *New York, supra,* at 639.

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual

participation in a free society meaningful and rewarding.[17] Under the Constitution, the State can "properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg* v. *New York*, 390 U. S., at 639.[18]

III

With these principles in mind, we consider the specific constitutional questions presented by these appeals. In § 12S, Massachusetts has attempted to reconcile the constitutional right of a woman, in consultation with her physician, to choose to terminate her pregnancy as established by *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), with the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child. As noted above, § 12S was before us in *Bellotti I*, 428 U. S. 132 (1976), where we remanded the case for interpretation of its provisions by the Supreme Judicial Court of Massachusetts. We previously had held in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), that a State could not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy. *Id.*, at 74. In

[17] See Hafen, Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Children to Their "Rights," 1976 B. Y. U. L. Rev. 605.

[18] The Court's opinions discussed in the text above—*Pierce*, *Yoder*, *Prince*, and *Ginsberg*—all have contributed to a line of decisions suggesting the existence of a constitutional parental right against undue, adverse interference by the State. See also *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 842–844 (1977); *Carey* v. *Population Services International*, 431 U. S. 678, 708 (1977) (opinion of POWELL, J.); *Moore* v. *East Cleveland*, 431 U. S. 494 (1977) (plurality opinion); *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). Cf. *Parham* v. *J. R.*, 442 U. S. 584 (1979); *id.*, at 621 (STEWART, J., concurring in result).

Bellotti I, supra, we recognized that § 12S could be read as "fundamentally different from a statute that creates a 'parental veto,' " 428 U. S., at 145, thus "avoid[ing] or substantially modify[ing] the federal constitutional challenge to the statute." *Id.*, at 148. The question before us—in light of what we have said in the prior cases—is whether § 12S, as authoritatively interpreted by the Supreme Judicial Court, provides for parental notice and consent in a manner that does not unduly burden the right to seek an abortion. See *id.*, at 147.

Appellees and intervenors contend that even as interpreted by the Supreme Judicial Court of Massachusetts § 12S does unduly burden this right. They suggest, for example, that the mere requirement of parental notice constitutes such a burden. As stated in Part II above, however, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.[19] It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns.[20] As MR. JUSTICE STEWART wrote in concurrence in *Planned Parenthood of Central Missouri* v. *Danforth, supra,* at 91:

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmar-

[19] In *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S., at 75, "[w]e emphasize[d] that our holding . . . [did] not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."

[20] The expert testimony at the hearings in the District Court uniformly was to the effect that parental involvement in a minor's abortion decision, if compassionate and supportive, was highly desirable. The findings of the court reflect this consensus. See *Baird I,* 393 F. Supp., at 853.

> ried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." (Footnote omitted.) [21]

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[21] MR. JUSTICE STEWART'S concurring opinion in *Danforth* underscored the need for parental involvement in minors' abortion decisions by describing the procedures followed at the clinic operated by the Parents Aid Society and Dr. Gerald Zupnick:

"The counseling . . . occurs entirely on the day the abortion is to be performed . . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . . The physician takes no part in this counseling process . . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . .

"The abortion itself takes five to seven minutes . . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician . . . may be performing abortions on many other adults and minors . . . . On busy days patients are scheduled in separate groups, consisting usually of five patients . . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room . . . ." 428 U. S., at 91–92, n. 2, quoting Brief for Appellants in *Bellotti I*, O. T. 1975, No. 75-73, pp. 43–44.

In *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), we emphasized the importance of the role of the attending physician. Those cases involved adult women presumably capable of selecting and obtaining a competent physician. In this case, however, we are concerned only with minors who, according to the record, may range in age from children of 12 years to 17-year-old teenagers. Even the latter are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent or unethical.

But we are concerned here with a constitutional right to seek an abortion. The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

A

The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibilty of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.

Moreover, the potentially severe detriment facing a pregnant woman, see *Roe* v. *Wade*, 410 U. S., at 153, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.

Yet, an abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of

family, may be feasible and relevant to the minor's best interests. Nonetheless, the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.

For these reasons, as we held in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S., at 74, "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." Although, as stated in Part II, *supra*, such deference to parents may be permissible with respect to other choices facing a minor, the unique nature and consequences of the abortion decision make it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." 428 U. S., at 74. We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure [22] whereby authorization for the abortion can be obtained.

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; [23] or

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[22] As § 12S provides for involvement of the state superior court in minors' abortion decisions, we discuss the alternative procedure described in the text in terms of judicial proceedings. We do not suggest, however, that a State choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.

[23] The nature of both the State's interest in fostering parental authority and the problem of determining "maturity" makes clear why the State generally may resort to objective, though inevitably arbitrary, criteria such as age limits, marital status, or membership in the Armed Forces for lifting some or all of the legal disabilities of minority. Not only is it difficult to

(2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth*. *Ibid.*

B

It is against these requirements that § 12S must be tested. We observe initially that as authoritatively construed by the highest court of the State, the statute satisfies some of the concerns that require special treatment of a minor's abortion decision. It provides that if parental consent is refused, authorization may be "obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary." A superior court judge presiding over a § 12S proceeding "must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests." [24] *Attorney General,*

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define, let alone determine, maturity, but also the fact that a minor may be very much an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline have ended. As discussed in the text, however, the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.

[24] The Supreme Judicial Court held that § 12S imposed this standard on the superior court in large part because it construed the statute as containing the same restriction on parents. See *supra*, at 630. The court concluded that the judge should not be entitled "to exercise his authority on a standard broader than that to which a parent must adhere." *Attorney General*, 371 Mass., at 748, 360 N. E. 2d, at 293.

Intervenors argue that, assuming state-supported parental involvement in the minor's abortion decision is permissible, the State may not endorse the

371 Mass., at 748, 360 N. E. 2d, at 293. The Supreme Judicial Court also stated: "Prompt resolution of a [§ 12S] proceeding may be expected. . . . The proceeding need not be brought in the minor's name and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents. . . . [W]e believe that an early hearing and decision on appeal from a judgment of a Superior Court judge may also be achieved." *Id.*, at 757–758, 360 N. E. 2d, at 298. The court added that if these expectations were not met, either the superior court, in the exercise of its rulemaking power, or the Supreme Judicial Court would be willing to eliminate any undue burdens by rule or order. *Ibid.*[25]

Despite these safeguards, which avoid much of what was objectionable in the statute successfully challenged in *Danforth*, § 12S falls short of constitutional standards in certain respects. We now consider these.

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withholding of parental consent for any reason not believed to be in the minor's best interests. They agree with the District Court that, even though § 12S was construed by the highest state court to impose this restriction, the statute is flawed because the restriction is not apparent on its face. Intervenors thus concur in the District Court's assumption that the statute will encourage parents to withhold consent for impermissible reasons. See *Baird III*, 450 F. Supp., at 1004–1005; *Baird II*, 428 F. Supp. 854, 855–856 (Mass. 1977).

There is no basis for this assertion. As a general rule, the interpretation of a state statute by the State's highest court "is as though written into the ordinance itself," *Poulos* v. *New Hampshire*, 345 U. S. 395, 402 (1953), and we are obliged to view the restriction on the parental-consent requirement "as if [§ 12S] had been so amended by the [Massachusetts] legislature." *Winters* v. *New York*, 333 U. S. 507, 514 (1948).

[25] Intervenors take issue with the Supreme Judicial Court's assurances that judicial proceedings will provide the necessary confidentiality, lack of procedural burden, and speed of resolution. In the absence of any evidence as to the operation of judicial proceedings under § 12S—and there is none, since appellees successfully sought to enjoin Massachusetts from putting it into effect—we must assume that the Supreme Judicial Court's judgment is correct.

(1)

Among the questions certified to the Supreme Judicial Court was whether § 12S permits any minors—mature or immature—to obtain judicial consent to an abortion without any parental consultation whatsoever. See n. 9, *supra*. The state court answered that, in general, it does not. "[T]he consent required by [§ 12S must] be obtained for every nonemergency abortion where the mother is less than eighteen years of age and unmarried." *Attorney General, supra*, at 750, 360 N. E. 2d, at 294. The text of § 12S itself states an exception to this rule, making consent unnecessary from any parent who has "died or has deserted his or her family." [26] The Supreme Judicial Court construed the statute as containing an additional exception: Consent need not be obtained "where no parent (or statutory substitute) is available." 371 Mass., at 750, 360 N. E. 2d, at 294. The court also ruled that an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion.[27] *Id.*, at 755–756, 360 N. E. 2d, at 297.

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[26] The statute also provides that "[i]f both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

[27] This reading of the statute requires parental consultation and consent more strictly than appellants themselves previously believed was necessary. In their first argument before this Court, and again before the Supreme Judicial Court, appellants argued that § 12S was not intended to abrogate Massachusetts' common-law "mature minor" rule as it applies to abortions. See 428 U. S., at 144. They also suggested that, under some circumstances, § 12S might permit even immature minors to obtain judicial approval for an abortion without any parental consultation. See 428 U. S., at 145; *Attorney General, supra*, at 751, 360 N. E. 2d, at 294. The Supreme Judicial Court sketched the outlines of the mature minor rule that would apply in the absence of § 12S: "The mature minor rule calls for an analysis of the nature of the operation, its likely benefit, and the capacity of the particular minor to understand fully what the medical procedure involves. . . . Judicial intervention is not required. If

We think that, construed in this manner, § 12S would impose an undue burden upon the exercise by minors of the right to seek an abortion. As the District Court recognized, "there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court." *Baird III*, 450 F. Supp., at 1001. There is no reason to believe that this would be so in the majority of cases where consent is withheld. But many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.

We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her

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judicial approval is obtained, however, the doctor is protected from a subsequent claim that the circumstances did not warrant his reliance on the mature minor rule, and, of course, the minor patient is afforded advance protection against a misapplication of the rule." *Id.*, at 752, 360 N. E. 2d, at 295. "We conclude that, apart from statutory limitations which are constitutional, where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth." *Id.*, at 754, 360 N. E. 2d, at 296. The Supreme Judicial Court held that the common-law mature minor rule was inapplicable to abortions because it had been legislatively superseded by § 12S.

best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation.

There is, however, an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision. Also, as we have observed above, parents naturally take an interest in the welfare of their children—an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents. These factors properly may be taken into account by a court called upon to determine whether an abortion in fact is in a minor's best interests. If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement. On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required.[28] For the reasons stated above, the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court.

(2)

Section 12S requires that both parents consent to a minor's abortion. The District Court found it to be "custom" to perform other medical and surgical procedures on minors with the consent of only one parent, and it concluded that "nothing about abortions . . . requires the minor's interest to be treated

[28] Of course, if the minor consults with her parents voluntarily and they withhold consent, she is free to seek judicial authorization for the abortion immediately.

differently." *Baird I*, 393 F. Supp., at 852. See *Baird III*, *supra*, at 1004 n. 9.

We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment. At least when the parents are together and the pregnant minor is living at home, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a daughter. Consent and involvement by parents in important decisions by minors long have been recognized as protective of their immaturity. In the case of the abortion decision, for reasons we have stated, the focus of the parents' inquiry should be the best interests of their daughter. As every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation, or consent, the general rule with respect to parental consent does not unduly burden the constitutional right. Moreover, where the pregnant minor goes to her parents and consent is denied, she still must have recourse to a prompt judicial determination of her maturity or best interests.[29]

(3)

Another of the questions certified by the District Court to the Supreme Judicial Court was the following: "If the superior court finds that the minor is capable [of making], and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary deci-

[29] There will be cases where the pregnant minor has received approval of the abortion decision by one parent. In that event, the parent can support the daughter's request for a prompt judicial determination, and the parent's support should be given great, if not dispositive, weight.

sion is a better one?" *Attorney General*, 371 Mass., at 747 n. 5, 360 N. E. 2d, at 293 n. 5. To this the state court answered:

> "[W]e do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact." *Id.*, at 748, 360 N. E. 2d, at 293.

The Supreme Judicial Court's statement reflects the general rule that a State may require a minor to wait until the age of majority before being permitted to exercise legal rights independently. See n. 23, *supra*. But we are concerned here with the exercise of a constitutional right of unique character. See *supra*, at 642–643. As stated above, if the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently. We therefore agree with the District Court that § 12S cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.[30]

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[30] Appellees and intervenors have argued that § 12S violates the Equal Protection Clause of the Fourteenth Amendment. As we have concluded that the statute is constitutionally infirm for other reasons, there is no need to consider this question.

IV

Although it satisfies constitutional standards in large part, § 12S falls short of them in two respects: First, it permits judicial authorization for an abortion to be withheld from a minor who is found by the superior court to be mature and fully competent to make this decision independently. Second, it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.[31] Accordingly, we affirm the judgment of the District Court insofar as it invalidates this statute and enjoins its enforcement.[32]

Affirmed.

MR. JUSTICE REHNQUIST, concurring.

I join the opinion of MR. JUSTICE POWELL and the judgment of the Court. At such time as this Court is willing to

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[31] Section 12S evidently applies to all nonemergency abortions performed on minors, without regard to the period in pregnancy during which the procedure occurs. As the court below recognized, most abortions are performed during the early stages of pregnancy, before the end of the first trimester. See *Baird III*, 450 F. Supp., at 1001; *Baird I*, 393 F. Supp., at 853. This coincides approximately with the pre-viability period during which a pregnant woman's right to decide, in consultation with her physician, to have an abortion is most immune to state intervention. See *Roe* v. *Wade*, 410 U. S., at 164–165.

The propriety of parental involvement in a minor's abortion decision does not diminish as the pregnancy progresses and legitimate concerns for the pregnant minor's health increase. Furthermore, the opportunity for direct access to court which we have described is adequate to safeguard throughout pregnancy the constitutionally protected interests of a minor in the abortion decision. Thus, although a significant number of abortions within the scope of § 12S might be performed during the later stages of pregnancy, we do not believe a different analysis of the statute is required for them.

[32] The opinion of MR. JUSTICE STEVENS, concurring in the judgment, joined by three Members of the Court, characterizes this opinion as "ad-

reconsider its earlier decision in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976), in which I joined the opinion of MR. JUSTICE WHITE, dissenting in part, I shall be more than willing to participate in that task. But unless and until that time comes, literally thousands of judges cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, concurring in the judgment.

In *Roe* v. *Wade*, 410 U. S. 113, the Court held that a woman's right to decide whether to terminate a pregnancy is

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visory" and the questions it addresses as "hypothetical." Apparently, this is criticism of our attempt to provide some guidance as to how a State constitutionally may provide for adult involvement—either by parents or a state official such as a judge—in the abortion decisions of minors. In view of the importance of the issue raised, and the protracted litigation to which these parties already have been subjected, we think it would be irresponsible simply to invalidate § 12S without stating our views as to the controlling principles.

The statute before us today is the same one that was here in *Bellotti I*. The issues it presents were not then deemed "hypothetical." In a unanimous opinion, we remanded the case with directions that appropriate questions be certified to the Supreme Judicial Court of Massachusetts "concerning the meaning of [§ 12S] and the procedure it imposes." 428 U. S., at 151. We directed that this be done because, as stated in the opinion, we thought the construction of § 12S urged by appellants would "avoid or substantially modify the federal constitutional challenge to the statute." *Id.*, at 148. The central feature of § 12S was its provision that a state-court judge could make the ultimate decision, when necessary, as to the exercise by a minor of the right to an abortion. See *id.*, at 145. We held that this "would be fundamentally different from a statute that creates a 'parental veto' [of the kind rejected in *Danforth*.]" *Ibid.* (footnote omitted). Thus, all Members of the Court agreed that providing for decisionmaking authority in a judge was not the kind of veto power held invalid in *Danforth*. The basic issues that were before us in *Bellotti I* remain in the case, sharpened by the construction of § 12S by the Supreme Judicial Court.

entitled to constitutional protection. In *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52, 72–75, the Court held that a pregnant minor's right to make the abortion decision may not be conditioned on the consent of one parent. I am persuaded that these decisions require affirmance of the District Court's holding that the Massachusetts statute is unconstitutional.

The Massachusetts statute is, on its face, simple and straightforward. It provides that every woman under 18 who has not married must secure the consent of both her parents before receiving an abortion. "If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown." Mass. Gen. Laws Ann., ch. 112, § 12S (West Supp. 1979).

Whatever confusion or uncertainty might have existed as to how this statute was to operate, see *Bellotti* v. *Baird,* 428 U. S. 132, has been eliminated by the authoritative construction of its provisions by the Massachusetts Supreme Judicial Court. See *Baird* v. *Attorney General,* 371 Mass. 741, 360 N. E. 2d 288 (1977). The statute was construed to require that every minor who wishes an abortion must first seek the consent of both parents, unless a parent is not available or unless the need for the abortion constitutes " 'an emergency requiring immediate action.' " *Id.,* at 750, 360 N. E. 2d, at 294. Both parents, so long as they are available, must also receive notice of judicial proceedings brought under the statute by the minor. In those proceedings, the task of the judge is to determine whether the best interests of the minor will be served by an abortion. The decision is his to make, even if he finds "that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion." *Id.,* at 748, 360 N. E. 2d, at 293. Thus, no minor in Massachusetts, no matter how mature and capable of informed decisionmaking, may receive an abortion without the consent

of either both her parents or a superior court judge. In every instance, the minor's decision to secure an abortion is subject to an absolute third-party veto.[1]

In *Planned Parenthood of Central Missouri* v. *Danforth, supra,* this Court invalidated statutory provisions requiring the consent of the husband of a married woman and of one parent of a pregnant minor to an abortion. As to the spousal consent, the Court concluded that "we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right." 428 U. S., at 70. And as to the parental consent, the Court held that "[j]ust as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Id.,* at 74. These holdings, I think, equally apply to the Massachusetts statute. The differences between the two statutes are few. Unlike the Missouri statute, Massachusetts requires the consent of both of the woman's parents. It does, of course, provide an alternative in the form of a suit initiated by the woman in superior court. But in that proceeding, the judge is afforded an absolute veto over the minor's decisions, based on his judgment of her best interests. In Massachusetts, then, as in Missouri, the State has imposed an "absolute limitation on the minor's right to obtain an abortion," *id.,* at 90 (STEWART, J., concurring), applicable to every pregnant minor in the State who has not married.

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[1] By affording such a veto, the Massachusetts statute does far more than simply provide for notice to the parents. See *post,* at 657 (WHITE, J., dissenting). Neither *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto.

The provision of an absolute veto to a judge—or, potentially, to an appointed administrator [2]—is to me particularly troubling. The constitutional right to make the abortion decision affords protection to both of the privacy interests recognized in this Court's cases: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen* v. *Roe*, 429 U. S. 589, 599–600 (footnotes omitted). It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. In Massachusetts, however, every minor who cannot secure the consent of both her parents—which under *Danforth* cannot be an absolute prerequisite to an abortion—is required to secure the consent of the sovereign. As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent.[3] Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds

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[2] See *ante*, at 643 n. 22.

[3] A minor may secure the assistance of counsel in filing and prosecuting her suit, but that is not guaranteed. The Massachusetts Supreme Judicial Court in response to the question whether a minor, upon a showing of indigency, may have court-appointed counsel, "construe[d] the statutes of the Commonwealth to authorize the appointment of counsel or a guardian ad litem for an indigent minor at public expense, if necessary, if the judge, *in his discretion*, concludes that the best interests of the minor would be served by such an appointment." *Baird* v. *Attorney General*, 371 Mass. 741, 764, 360 N. E. 2d 288, 301 (1977) (emphasis added).

with privacy interests underlying the constitutional protection afforded to her decision.

In short, it seems to me that this litigation is governed by *Danforth;* to the extent this statute differs from that in *Danforth,* it is potentially even more restrictive of the constitutional right to decide whether or not to terminate a pregnancy. Because the statute has been once authoritatively construed by the Massachusetts Supreme Judicial Court, and because it is clear that the statute as written and construed is not constitutional, I agree with MR. JUSTICE POWELL that the District Court's judgment should be affirmed. Because his opinion goes further, however, and addresses the constitutionality of an abortion statute that Massachusetts has not enacted, I decline to join his opinion.[4]

MR. JUSTICE WHITE, dissenting.

I was in dissent in *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52, 94–95 (1976), on the issue of the validity of requiring the consent of a parent when an unmarried woman under 18 years of age seeks an abortion. I continue to have the views I expressed there and also agree with much of what MR. JUSTICE STEVENS said in dissent in that

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[4] Until and unless Massachusetts or another State enacts a less restrictive statutory scheme, this Court has no occasion to render an advisory opinion on the constitutionality of such a scheme. A real statute—rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions MR. JUSTICE POWELL has elected to address. Indeed, there is a certain irony in his suggestion that a statute that is intended to vindicate "the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child," see *ante,* at 639, need not require notice to the parents of the minor's intended decision. That irony makes me wonder whether any legislature concerned with parental consultation would, in the absence of today's advisory opinion, have enacted a statute comparable to the one my Brethren have discussed.

case. *Id.*, at 101–105. I would not, therefore, strike down this Massachusetts law.

But even if a parental consent requirement of the kind involved in *Danforth* must be deemed invalid, that does not condemn the Massachusetts law, which, when the parents object, authorizes a judge to permit an abortion if he concludes that an abortion is in the best interests of the child. Going beyond *Danforth*, the Court now holds it unconstitutional for a State to require that in all cases parents receive notice that their daughter seeks an abortion and, if they object to the abortion, an opportunity to participate in a hearing that will determine whether it is in the "best interests" of the child to undergo the surgery. Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.

With all due respect, I dissent.

WASHINGTON ET AL. *v.* WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 77–983. Argued February 28, 1979—Decided July 2, 1979*

In 1854 and 1855, the United States entered into a series of treaties with certain Indian tribes whereby the Indians relinquished their interest in certain lands in what is now the State of Washington in exchange for monetary payments, certain relatively small parcels of land reserved for their exclusive use, and other guarantees, including protection of their "right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the Territory." The principal question in this extensive litigation concerns the character of the treaty right to take fish. In 1970, the United States, on its own behalf and as trustee for seven Indian tribes, brought suit against the State of Washington in Federal District Court, seeking an interpretation of the treaties and an injunction requiring the State to protect the Indians' share of runs of anadromous fish. At various stages of the proceedings, additional tribes, the State Departments of Fisheries and Game, and a commercial fishing group were joined as parties. The District Court held that under the treaties, the Indians are currently entitled to a 45% to 50% share of the harvestable fish passing through their recognized tribal fishing grounds in the case area, to be calculated on a river-by-river, run-by-run basis, subject to certain adjustments. With a slight modification of one of the adjustments, the Court of Appeals affirmed, and this Court denied certiorari. Pursuant to the District Court's injunction, the Department of Fisheries promulgated regulations protecting the Indians' treaty rights, but the State Supreme Court, in two cases (consolidated here in No. 77–983), ruled that the Fisheries Department could not comply with the federal injunction, holding, *inter alia*, that, as a matter of federal law, the treaties did not give the Indians a right to a share of the fish runs.

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*Together with *Washington et al.* v. *Puget Sound Gillnetters Assn. et al.*, also on certiorari to the same court (see this Court's Rule 23 (5)); and No. 78–119, *Washington et al.* v. *United States et al.*, and No. 78–139, *Puget Sound Gillnetters Assn. et al.* v. *United States District Court for the Western District of Washington* (*United States et al., Real Parties in Interest*), on certiorari to the United States Court of Appeals for the Ninth Circuit.

The District Court then entered a series of orders enabling it directly to supervise those aspects of the State's fisheries necessary to the preservation of treaty fishing rights. The District Court's power to take such direct action and, in doing so, to enjoin persons who were not parties to the proceedings was affirmed by the Court of Appeals. That court, in a separate opinion, also held that regulations of the International Pacific Salmon Fisheries Commission (IPSFC) posed no impediment to the District Court's interpretation of the treaty language and to its enforcement of that interpretation.

Held:

1. The language of the treaties securing a "right of taking fish . . . in common with all citizens of the Territory" was not intended merely to guarantee the Indians access to usual and accustomed fishing sites and an "equal opportunity" for individual Indians, along with non-Indians, to try to catch fish, but instead secures to the Indian tribes a right to harvest a share of each run of anadromous fish that passes through tribal fishing areas. This conclusion is mandated by a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and, particularly, this Court's prior decisions construing the treaties. *United State* v. *Winans*, 198 U. S. 371; *Puyallup Tribe* v. *Washington Game Dept.*, 391 U. S. 392 (*Puyallup I*); *Washington Game Dept.* v. *Puyallup Tribe*, 414 U. S. 44 (*Puyallup II*); *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165 (*Puyallup III*). Pp. 674–685.

2. An equitable measure of the common right to take fish should initially divide the harvestable portion of each run that passes through a "usual and accustomed" place into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount. Cf. *Puyallup III*, *supra*. Although the District Court's exercise of its discretion, as slightly modified by the Court of Appeals, is in most respects unobjectionable, the District Court erred in excluding fish taken by the Indians on their reservations from their share of the runs, and in excluding fish caught for the Indians' ceremonial and subsistence needs. Pp. 685–689.

3. The Convention of May 26, 1930, whereby Canada and the United States agreed that the catch of Fraser River salmon should be equally divided between Canadian and American fishermen, subject to regulations proposed by the IPSFC for approval by both countries, does not pre-empt the Indians' fishing rights under the treaties with respect to Fraser River salmon runs passing through certain "usual and accustomed" places of treaty tribes. Pp. 689–692.

4. Any state-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause,

and the State Game and Fisheries Departments, as parties to this litigation, may be ordered to prepare a set of rules that will implement the court's interpretation of the parties' rights even if state law withholds from them the power to do so. Cf. *Puyallup III, supra.* Whether or not the Game and Fisheries Departments may be ordered actually to promulgate regulations having effect as a matter of state law, the District Court may assume direct supervision of the fisheries if state recalcitrance or state-law barriers should be continued. If the spirit of cooperation motivating the State Attorney General's representation to this Court that definitive resolution of the basic federal question of construction of the treaties will allow state compliance with federal-court orders is not confirmed by the conduct of state officials, the District Court has the power to undertake the necessary remedial steps and to enlist the aid of appropriate federal law enforcement agents in carrying out those steps. Pp. 692–696.

No. 78–119, 573 F. 2d 1118, affirmed, and 573 F. 2d 1123, vacated and remanded; No. 77–983, 88 Wash. 2d 677, 565 P. 2d 1151 (first case), and 89 Wash. 2d 276, 571 P. 2d 1373 (second case), vacated and remanded; No. 78–139, 573 F. 2d 1123, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined and in Parts I, II, and III of which STEWART, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed an opinion dissenting in part, in which STEWART and REHNQUIST, JJ., joined, *post,* p. 696.

Slade Gorton, Attorney General of Washington, argued the cause for the State of Washington. With him on the briefs were *Edward B. Mackie,* Deputy Attorney General, *James M. Johnson,* Senior Assistant Attorney General, and *Timothy R. Malone,* Assistant Attorney General. *Philip A. Lacovara* argued the cause for the Puget Sound Gillnetters Association et al. With him on the briefs were *Charles E. Yates, Douglas Fryer, Joseph T. Mijich,* and *Gerald Goldman. Richard W. Pierson* filed a brief for the Washington State Commercial Passenger Fishing Vessel Association in all cases.

Louis F. Claiborne argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General*

Barnett, and *Kathryn A. Oberly*. *Mason D. Morisset* argued the cause for the Lummi Indian Tribe et al. With him on the brief were *Steven S. Anderson*, *Thomas P. Schlosser*, *Alan C. Stay*, *Robert Pelcyger*, *Daniel A. Raas*, *William H. Rodgers, Jr.*, and *John Clinebell*. *Michael Taylor* filed a brief for the Quinault Indian Nation. *James B. Hovis* filed a brief for the Yakima Nation, respondent in Nos. 78–119 and 78–139. *Dennis C. Karnopp* and *Douglas Nash* filed a brief for the Confederated Tribes of the Warm Springs Reservation Oregon et al., respondents in Nos. 78–119 and 78–139.†

MR. JUSTICE STEVENS delivered the opinion of the Court.

To extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River in what is now the State of Washington,[1] the United States entered into a series of treaties with Indian

†Briefs of *amici curiae* urging reversal in No. 77–983 and affirmance in Nos. 78–119 and 78–139 were filed by *David H. Getches*, *Burt Neuborne*, and *Stephen L. Pevar* for the American Civil Liberties Union et al.; and by *Arthur Lazarus, Jr.*, for the Nez Perce Tribe of Idaho.

Briefs of *amici curiae* were filed by *Frederick L. Noland* for the American Friends Service Committee et al.; by *J. Carl Mundt* and *Henry H. Happel III* for the American Institute of Fishery Research Biologists; by *Don S. Willner* for the Northwest Steelhead and Salmon Council of Trout Unlimited; by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation; and by *Paul W. Steere* for the Pacific Seafood Processors Association.

[1] By three earlier treaties the United States had extinguished the conflicting claims of Spain in 1820 and Russia in 1824, 8 Stat. 252, 302, and Great Britain in 1846, 9 Stat. 869. In 1848, Congress established the Oregon Territory, 9 Stat. 323; that statute provided that nothing contained therein "shall be construed to impair the rights of person or property now pertaining to the Indians and said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." In 1850, Congress authorized the negotiation of treaties to extinguish the Indian claims to land lying west of the Cascade Mountains, 9 Stat. 437. In 1853, the Washington Territory, which includes the present State of Washington, was organized out of the Oregon Territory. Ch. 90, 10 Stat. 172.

tribes in 1854 and 1855.[2] The Indians relinquished their interest in most of the Territory in exchange for monetary payments. In addition, certain relatively small parcels of land were reserved for their exclusive use, and they were afforded other guarantees, including protection of their "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." 10 Stat. 1133.

The principal question presented by this litigation concerns the character of that treaty right to take fish. Various other issues are presented, but their disposition depends on the answer to the principal question. Before answering any of these questions, or even stating the issues with more precision, we shall briefly describe the anadromous fisheries of the Pacific Northwest, the treaty negotiations, and the principal components of the litigation complex that led us to grant these three related petitions for certiorari.

I

Anadromous fish hatch in fresh water, migrate to the ocean where they are reared and reach mature size, and eventually complete their life cycle by returning to the fresh-water place of their origin to spawn. Different species have different life cycles, some spending several years and traveling great distances in the ocean before returning to spawn and some even returning to spawn on more than one occasion before dying.

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[2] Treaty of Medicine Creek (10 Stat. 1132); Treaty of Point Elliott (12 Stat. 927); Treaty of Point No Point (12 Stat. 933); Treaty of Neah Bay (12 Stat. 939); Treaty with the Yakamas (12 Stat. 951); and Treaty of Olympia (12 Stat. 971). The parties to the treaties and to this litigation include these Indian tribes: Hoh; Lower Elwha Band of Clallam Indians; Lummi; Makah; Muckleshoot; Nisqually; Nooksack; Port Gamble Band of Clallam Indians; Puyallup; Quileute; Quinault; Sauk-Suiattle; Skokomish; Squaxin Island; Stillaguamish; Suquamish; Swinomish; Tulalip; Upper Skagit; and Yakima Nation. 384 F. Supp. 312, 349; 459 F. Supp. 1020, 1028.

384 F. Supp. 312, 384, 405. See Comment, State Power and the Indian Treaty Right to Fish, 59 Calif. L. Rev. 485, 501, and n. 99 (1971). The regular habits of these fish make their "runs" predictable; this predictability in turn makes it possible for both fishermen and regulators to forecast and to control the number of fish that will be caught or "harvested." Indeed, as the terminology associated with it suggests, the management of anadromous fisheries is in many ways more akin to the cultivation of "crops"—with its relatively high degree of predictability and productive stability, subject mainly to sudden changes in climatic patterns—than is the management of most other commercial and sport fisheries. 384 F. Supp., at 351, 384.

Regulation of the anadromous fisheries of the Northwest is nonetheless complicated by the different habits of the various species of salmon and trout involved, by the variety of methods of taking the fish, and by the fact that a run of fish may pass through a series of different jurisdictions.[3] Another complexity arises from the fact that the State of Washington has attempted to reserve one species, steelhead trout, for sport fishing and therefore conferred regulatory jurisdiction over that species upon its Department of Game, whereas the various species of salmon are primarily harvested by commercial fishermen and are managed by the State's Department of Fisheries. *Id.*, at 383–385, 389–399. Moreover, adequate regulation not only must take into account the potentially

[3] For example, pink and sockeye salmon hatched in Canada's Fraser River pass through the Strait of Juan de Fuca in the State of Washington, swim out into international waters on the open sea, and return through the strait to the river, passing on the way the usual and accustomed fishing grounds of the Makah Indian Tribe once again in Washington. 384 F. Supp., at 392. During much of the return run during which they pass through international, state, and Canadian waters, the fish are in optimum harvestable condition. See also *id.*, at 386–387, regarding the Puget Sound and Olympic Peninsula origin chinook salmon that pass through international waters, as well as those of Washington, Canada, and Alaska.

conflicting interests of sport and commercial fishermen, as well as those of Indian and nontreaty fishermen, but also must recognize that the fish runs may be harmed by harvesting either too many or too few of the fish returning to spawn. *Id.*, at 384, 390.

The anadromous fish constitute a natural resource of great economic value to the State of Washington. Millions of salmon, with an average weight of from 4 or 5 to about 20 pounds, depending on the species, are harvested each year. Over 6,600 nontreaty fishermen and about 800 Indians make their livelihood by commercial fishing; moreover, some 280,000 individuals are licensed to engage in sport fishing in the State.[4] *Id.*, at 387. See *id.*, at 399.

II

One hundred and twenty-five years ago when the relevant treaties were signed, anadromous fish were even more important to most of the population of western Washington than they are today. At that time, about three-fourths of the approximately 10,000 inhabitants of the area were Indians. Although in some respects the cultures of the different tribes varied—some bands of Indians, for example, had little or no tribal organization[5] while others, such as the Makah and the Yakima, were highly organized—all of them shared a vital and unifying dependence on anadromous fish. *Id.*, at 350. See *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165, 179 (BRENNAN, J., dissenting in part).

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[4] Although in terms of the number and weight of the fish involved, the commercial salmon catch is far more substantial than the recreational steelhead catch, the latter apparently provides the State with more revenue than the former, involves more people, and has accordingly been a more controversial political issue within the State. See *id.*, at 399.

[5] Indeed, the record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties. *Id.*, at 354–355, 366.

Religious rites were intended to insure the continual return of the salmon and the trout; the seasonal and geographic variations in the runs of the different species determined the movements of the largely nomadic tribes. 384 F. Supp., at 343, 351, 382; 459 F. Supp. 1020, 1079; 520 F. 2d 676, 682. Fish constituted a major part of the Indian diet, was used for commercial purposes,[6] and indeed was traded in substantial volume.[7] The Indians developed food-preservation techniques

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[6] "From the earliest known times, up to and beyond the time of the . . . treaties, the Indians comprising each of the treating tribes and bands were primarily a fishing, hunting and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture. They were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers. Anadromous fish was the great staple of their diet and livelihood. They cured and dried large quantities for year around use, both for themselves and for others through sale, trade, barter and employment." *Id.*, at 406. See also 520 F. 2d 676, 682 ("The Indians west of the Cascade Mountains were known as 'fish-eaters'; their diets, social customs, and religious practices centered on the capture of fish").

[7] "At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is some evidence that the volume of this intra-tribal trade was substantial, but it is not possible to compare it with the volume of present day commercial trading in salmon. Such trading was, however, important to the Indians at the time of the treaties. In addition to potlatching, which is a system of exchange between communities in a social context often typified by competitive gifting, there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local non-Indian consumption and for export, as well as to provide money for purchase of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of the non-Indian movement into the area. Those involved in negotiating the treaties recognized the contribution that Indian fishermen made to the territorial economy because Indians caught most of the non-Indians' fish for them, plus clams and oysters." 384 F. Supp., at

that enabled them to store fish throughout the year and to transport it over great distances. 384 F. Supp., at 351.[8] They used a wide variety of methods to catch fish, including the precursors of all modern netting techniques. *Id.*, at 351, 352, 362, 368, 380. Their usual and accustomed fishing places were numerous and were scattered throughout the area, and included marine as well as fresh-water areas. *Id.*, at 353, 360, 368–369.

All of the treaties were negotiated by Isaac Stevens, the first Governor and first Superintendent of Indian Affairs of the Washington Territory, and a small group of advisers. Contemporaneous documents make it clear that these people recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries. *Id.*, at 355, 363.[9] There is no evidence of the precise understanding the

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351–352 (citations to record omitted). See also *id.*, at 364 (Makah Tribe "maintained from time immemorial a thriving economy based on commerce" in "marine resources").

[8] In late December 1854, one territorial official wrote the Commissioner of Indian Affairs that "[t]he Indians on Puget Sound . . . form a very considerable portion of the trade of the Sound. . . . They catch most of our fish, supplying not only our people with clams and oysters, but salmon to those who cure and export it." App. 329.

[9] Governor Stevens in discussing the policy that he intended to pursue during negotiations with the tribes, in a letter dated September 16, 1854, to the Commissioner of Indian Affairs, said:

"The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing. It is therefore desirable that this question should be set at rest by law." *Id.*, at 327. See also *id.*, at 332.

The Governor's concern with protecting the Indians' continued exploitation of their accustomed fisheries was reflected in his assurances to the Indians during the treaty negotiations that under the treaties they would be able to go outside of reservation areas for the purpose of harvesting

Indians had of any of the specific English terms and phrases in the treaty.[10] *Id.*, at 356. It is perfectly clear, however, that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places, whether on or off the reservations, *id.*, at 355, and that they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right.[11]

Referring to the negotiations with the Yakima Nation, by far the largest of the Indian tribes, the District Court found:

> "At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising. The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians'

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fish. His statement at the signing of the Treaty of Point Elliott on Monday, January 22, 1855, was characteristic:

"We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries." *Id.*, at 329–330.

[10] Indeed, the translation of the English words was difficult because the interpreter used a "Chinook jargon" to explain treaty terms, and that jargon not only was imperfectly (and often not) understood by many of the Indians but also was composed of a simple 300-word commercial vocabulary that did not include words corresponding to many of the treaty terms. 384 F. Supp., at 330, 355–356, 364, 381; 520 F. 2d, at 683.

[11] For example, Governor Stevens made the following statement to the Indians gathered at Point-No-Point to negotiate the treaty bearing that name:

"Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . This paper secures your fish? Does not a father give food to his children?" App. 330–331.

understanding of the meaning of the treaty." *Id.*, at 381 (record citations omitted).

See also *id.*, at 363 (similar finding regarding negotiations with the Makah Tribe).

The Indians understood that non-Indians would also have the right to fish at their off-reservation fishing sites. But this was not understood as a significant limitation on their right to take fish.[12] Because of the great abundance of fish and the limited population of the area, it simply was not contemplated that either party would interfere with the other's fishing rights. The parties accordingly did not see the need and did not intend to regulate the taking of fish by either Indians or non-Indians, nor was future regulation foreseen. *Id.*, at 334, 355, 357.

Indeed, for several decades after the treaties were signed, Indians continued to harvest most of the fish taken from the waters of Washington, and they moved freely about the Territory and later the State in search of that resource. *Id.*, at 334. The size of the fishery resource continued to obviate the need during the period to regulate the taking of fish by either Indians or non-Indians. *Id.*, at 352. Not until major economic developments in canning and processing occurred in the last few years of the 19th century did a significant non-Indian fishery develop.[13] It was as a consequence of these

[12] "There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities or tribal control over them would in any way be restricted or impaired by the treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians." 384 F. Supp., at 357.

[13] "The non-Indian commercial fishing industry did not fully develop in the case area until after the invention and perfection of the canning process. The first salmon cannery in Puget Sound began in 1877 with a small operation at Mukilteo. Large-scale development of the commercial fish-

developments, rather than of the treaty, that non-Indians began to dominate the fisheries and eventually to exclude most Indians from participating in it—a trend that was encouraged by the onset of often discriminatory state regulation in the early decades of the 20th century. *Id.*, at 358, 394, 404, 407; 459 F. Supp., at 1032.[14]

In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.

III

Unfortunately, that resource has now become scarce, and the meaning of the Indians' treaty right to take fish has accordingly become critical. The United States Court of Appeals for the Ninth Circuit and the Supreme Court of the State of Washington have issued conflicting decisions on its meaning. In addition, their holdings raise important ancillary questions that will appear from a brief review of this extensive litigation.

The federal litigation was commenced in the United States District Court for the Western District of Washington in 1970. The United States, on its own behalf and as trustee for seven Indian tribes, brought suit against the State of Washington

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eries did not commence in Puget Sound until the mid-1890's. The large-scale development of the commercial fishing industry in the last decades of the Nineteenth Century brought about the need for regulation of fish harvests." *Id.*, at 352 (record citations omitted). See also *id.*, at 406.

[14] The impact of illegal regulation, see *Tulee* v. *Washington*, 315 U. S. 681, and of illegal exclusionary tactics by non-Indians, see *United States* v. *Winans*, 198 U. S. 371, in large measure accounts for the decline of the Indian fisheries during this century and renders that decline irrelevant to a determination of the fishing rights the Indians assumed they were securing by initialing the treaties in the middle of the last century.

seeking an interpretation of the treaties and an injunction requiring the State to protect the Indians' share of the anadromous fish runs. Additional Indian tribes, the State's Fisheries and Game Departments, and one commercial fishing group, were joined as parties at various stages of the proceedings, while various other agencies and groups, including all of the commercial fishing associations that are parties here, participated as *amici curiae*. 384 F. Supp., at 327, 328, and n. 4; 459 F. Supp., at 1028.

During the extensive pretrial proceedings, four different interpretations of the critical treaty language were advanced. Of those, three proceeded from the assumption that the language required some allocation to the Indians of a share of the runs of fish passing through their traditional fishing areas each year. The tribes themselves contended that the treaties had reserved a pre-existing right to as many fish as their commercial and subsistence needs dictated. The United States argued that the Indians were entitled either to a 50% share of the "harvestable" fish that originated in and returned to the "case area" and passed through their fishing places,[15] or to their needs, whichever was less. The Department of Fisheries agreed that the Indians were entitled to "a fair and equitable share" stated in terms of a percentage of the harvestable salmon in the area; ultimately it proposed a share of "one-third."

Only the Game Department thought the treaties provided no assurance to the Indians that they could take some portion

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[15] The "harvestable" amount of fish is determined by subtracting from the total number of fish in each run the number that must be allowed to escape for conservation purposes.

The "case area" was defined by the District Court as

"that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area, and includes the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas." 384 F. Supp., at 328.

of each run of fish. That agency instead argued that the treaties gave the Indians no fishing rights not enjoyed by nontreaty fishermen except the two rights previously recognized by decisions of this Court—the right of access over private lands to their usual and accustomed fishing grounds, see *Seufert Bros. Co.* v. *United States,* 249 U. S. 194; *United States* v. *Winans,* 198 U. S. 371, and an exemption from the payment of license fees. See *Tulee* v. *Washington,* 315 U. S. 681.

The District Court agreed with the parties who advocated an allocation to the Indians, and it essentially agreed with the United States as to what that allocation should be. It held that the Indians were then entitled to a 45% to 50% share of the harvestable fish that will at some point pass through recognized tribal fishing grounds in the case area.[16] The share was to be calculated on a river-by-river, run-by-run basis, subject to certain adjustments. Fish caught by Indians for ceremonial and subsistence purposes as well as fish caught within a reservation were excluded from the calculation of the tribes' share.[17] In addition, in order to compensate for fish caught outside of the case area, *i. e.,* beyond the State's jurisdiction, the court made an "equitable adjustment" to increase the allocation to the Indians. The court left it to the individual tribes involved to agree among themselves on how best to divide the Indian share of runs that pass through the usual and accustomed grounds of more than one tribe, and it postponed until a later date the proper accounting for hatchery-bred fish. 384 F. Supp., at 416–417; 459 F. Supp.,

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[16] A factual dispute exists on the question of what percentage of the fish in the case area actually passes through Indian fishing areas and is therefore subject to the District Court's allocations. In the absence of any relevant findings by the courts below, we are unable to express any view on the matter.

[17] Moreover, fish caught by individual Indians at off-reservation locations that are not "usual and accustomed" sites, were treated as if they had been caught by nontreaty fishermen. 384 F. Supp., at 410.

at 1129. With a slight modification,[18] the Court of Appeals for the Ninth Circuit affirmed, 520 F. 2d 676, and we denied certiorari, 423 U. S. 1086.[19]

The injunction entered by the District Court required the Department of Fisheries (Fisheries) to adopt regulations protecting the Indians' treaty rights. 384 F. Supp., at 416–417. After the new regulations were promulgated, however, they were immediately challenged by private citizens in suits commenced in the Washington state courts. The State Supreme Court, in two cases that are here in consolidated form in No. 77–983, ultimately held that Fisheries could not comply with the federal injunction. *Puget Sound Gillnetters Assn.* v. *Moos*, 88 Wash. 2d 677, 565 P. 2d 1151 (1977); *Fishing Vessel Assn.* v. *Tollefson*, 89 Wash. 2d 276, 571 P. 2d 1373 (1977).

As a matter of federal law, the state court first accepted the Game Department's and rejected the District Court's interpretation of the treaties and held that they did not give the Indians a right to a share of the fish runs, and second concluded that recognizing special rights for the Indians would violate the Equal Protection Clause of the Fourteenth Amendment. The opinions might also be read to hold, as a matter of state

[18] The Court of Appeals held that fish caught by nonresidents of Washington should be eliminated from the equitable adjustment for fish caught beyond the State's jurisdiction. 520 F. 2d, at 689.

[19] Despite our earlier denial of certiorari on the treaty interpretation issue, we decline the Government's invitation to treat the matter as having been finally adjudicated. Our earlier denial came at an interlocutory stage in the proceedings—the District Court has retained continuing enforcement jurisdiction over the case—so that we certainly are not required to treat the earlier disposition as final for our purposes. *Reece* v. *Georgia*, 350 U. S. 85, 87. Moreover, the reason for our recent grant of certiorari on the question remains because the state courts are—and, at least since the State Supreme Court's decision in *Department of Game* v. *Puyallup Tribe*, 86 Wash. 2d 664, 548 P. 2d 1058 (1976), have been—on record as interpreting the treaties involved differently from the federal courts. Accordingly, there is strong reason not to treat it as final as a discretionary matter.

law, that Fisheries had no authority to issue the regulations because they had a purpose other than conservation of the resource. In this Court, however, the Attorney General of the State disclaims the adequacy and independence of the state-law ground and argues that the state-law authority of Fisheries is dependent on the answers to the two federal-law questions discussed above. Brief for State of Washington 99. See n. 34, *infra*. We defer to that interpretation, subject, of course, to later clarification by the State Supreme Court. Because we are also satisfied that the constitutional holding is without merit,[20] our review of the state court's judgment will be limited to the treaty issue.

When Fisheries was ordered by the state courts to abandon its attempt to promulgate and enforce regulations in compliance with the federal court's decree—and when the Game Department simply refused to comply—the District Court entered a series of orders enabling it, with the aid of the United States Attorney for the Western District of Washington and various federal law enforcement agencies, directly to supervise those aspects of the State's fisheries necessary to the preservation of treaty fishing rights. 459 F. Supp. 1020. The District Court's power to take such direct action and, in doing so, to enjoin persons who were not parties to the proceeding was affirmed by the United States Court of Appeals

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[20] The Washington Supreme Court held that the treaties would violate equal protection principles if they provided fishing rights to Indians that were not also available to non-Indians. The simplest answer to this argument is that this Court has already held that these treaties confer enforceable special benefits on signatory Indian tribes, *e. g.*, *Tulee* v. *Washington*, 315 U. S. 681; *United States* v. *Winans*, 198 U. S. 317, and has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's "unique obligation toward the Indians." *Morton* v. *Mancari*, 417 U. S. 535, 555. See *United States* v. *Antelope*, 430 U. S. 641; *Antoine* v. *Washington*, 420 U. S. 194. See also *Fishing Vessel Assn.* v. *Tollefson*, 89 Wash. 2d 276, 287–288, 571 P. 2d 1373, 1379–1380 (1977) (Utter, J., dissenting).

for the Ninth Circuit. 573 F. 2d 1123. That court, in a separate opinion, 573 F. 2d 1118, also held that regulations of the International Pacific Salmon Fisheries Commission posed no impediment to the District Court's interpretation of the treaty language and to its enforcement of that interpretation. Subsequently, the District Court entered an enforcement order regarding the salmon fisheries for the 1978 and subsequent seasons, which, prior to our issuance of a writ of certiorari to review the case, was pending on appeal in the Court of Appeals. App. 486–490.

Because of the widespread defiance of the District Court's orders, this litigation has assumed unusual significance. We granted certiorari in the state and federal cases to interpret this important treaty provision and thereby to resolve the conflict between the state and federal courts regarding what, if any, right the Indians have to a share of the fish, to address the implications of international regulation of the fisheries in the area, and to remove any doubts about the federal court's power to enforce its orders. 439 U. S. 909.

IV

The treaties secure a "right of taking fish." The pertinent articles provide:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens." [21]

[21] The language is quoted from Art. III of the Treaty of Medicine Creek, 10 Stat. 1133. Identical, or almost identical, language is included in each of the other treaties.

At the time the treaties were executed there was a great abundance of fish and a relative scarcity of people. No one had any doubt about the Indians' capacity to take as many fish as they might need. Their right to take fish could therefore be adequately protected by guaranteeing them access to usual and accustomed fishing sites which could be—and which for decades after the treaties were signed were—comfortably shared with the incoming settlers.

Because the sparse contemporaneous written materials refer primarily to assuring access to fishing sites "in common with all citizens of the Territory," the State of Washington and the commercial fishing associations, having all adopted the Game Department's original position, argue that it was merely access that the negotiators guaranteed. It is equally plausible to conclude, however, that the specific provision for access was intended to secure a greater right—a right to harvest a share of the runs of anadromous fish that at the time the treaties were signed were so plentiful that no one could question the Indians' capacity to take whatever quantity they needed. Indeed, a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and this Court's prior construction of the treaties, mandates that conclusion.

A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. *E. g., Lone Wolf* v. *Hitchcock,* 187 U. S. 553. When the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length. There is no reason to doubt that this assumption applies to the treaties at issue here. See 520 F. 2d, at 684.

Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively su-

perior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11. This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor. *Tulee* v. *Washington*, 315 U. S. 681; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194; *United States* v. *Winans*, 198 U. S. 371. See also *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 484.

Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent. See *supra*, at 666–668. It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries," see n. 9, *supra*, and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish. That each individual Indian would share an "equal opportunity" with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations.[22] Such a "right,"

[22] The State characterizes its interpretation of the treaty language as assuring Indians and non-Indians an "equal opportunity" to take fish from the State's waters. This appellation is misleading. In the first place, even the State recognizes that the treaties provide Indians with certain rights—*i. e.*, the right to fish without a license and to cross private lands—that non-Indians do not have. See *Tulee* v. *Washington*, 315 U. S. 681; *Seufert Bros. Co.* v. *United States*, 249 U. S. 194; *United States* v. *Winans*, 198 U. S. 371. See also *Puyallup Tribe* v. *Washington Game*

along with the $207,500 paid the Indians, would hardly have been sufficient to compensate them for the millions of acres they ceded to the Territory.

It is true that the words "in common with" may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians or as securing an interest in the fish runs themselves. If we were to construe these words by reference to 19th-century property concepts, we might accept the former interpretation, although even "learned lawyers" of the day would probably have offered differing interpretations of the three words.[23]

Dept., 433 U. S. 165. Whatever opportunities the treaties assure Indians with respect to fish are admittedly not "equal" to, but are to some extent greater than, those afforded other citizens. It is therefore simply erroneous to suggest that the treaty language "confers upon non-Indians precisely the same right to fish that it confers upon Indians." POWELL, J., dissenting, *post*, at 698.

Moreover, in light of the far superior numbers, capital resources, and technology of the non-Indians, the concept of the Indians' "equal *opportunity*" to take advantage of a scarce resource is likely in practice to mean that the Indians' "right of taking fish" will net them virtually no catch at all. For the "opportunity" is at best theoretical. Indeed, in 1974, before the District Court's injunction took effect, and while the Indians were still operating under the "equal opportunity" doctrine, their take amounted to approximately 2% of the total harvest of salmon and trout in the treaty area. 459 F. Supp., at 1032.

[23] The State argues that at common law a "common fishery" was merely a nonexclusive right of access, see 3 J. Kent, Commentaries 412 (5th ed. 1844), and that the right of a fishery was appurtenant to specific parcels of real property. The State does not suggest, however, that these concepts were understood by, or explained to, the Indians. Indeed, there is no evidence that Governor Stevens understood them, although one of his advisers, George Gibbs, was a lawyer.

But even if we indulge in the highly dubious assumption that Gibbs was learned in the intricacies of water law, that he incorporated them in the treaties, and that he explained them fully to the Indians, the treaty language would still be subject to the different interpretations presented by the parties to this litigation. For in addition to "common fisheries," the "in common with" language was used in two other relevant senses

But we think greater importance should be given to the Indians' likely understanding of the other words in the treaties and especially the reference to the "right of *taking* fish"—a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise. This language is particularly meaningful in the context of anadromous fisheries—which were not the focus of the common law—because of the relative predictability of the "harvest." In this context, it makes sense to say that a party has a right to "take"—rather than merely the "opportunity" to try to catch—some of the large quantities of fish that will almost certainly be available at a given place at a given time.

This interpretation is confirmed by additional language in the treaties. The fishing clause speaks of "securing" certain fishing rights, a term the Court has previously interpreted as synonymous with "reserving" rights previously exercised. *Winans*, 198 U. S., at 381. See also *New York ex rel. Kennedy* v. *Becker*, 241 U. S. 556, 563–564. Because the Indians had al-

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during the period. First, a "common *of* fishery" meant a limited right, acquired from the previously exclusive owner of certain fishing rights (in this case the Indians), "of taking fish *in common with* certain others in waters flowing through [the grantor's] land." J. Gould, Laws of Waters § 183 (3d ed. 1900) (emphasis added); see 3 Kent, *supra*, at 410. Under that understanding of the language, it would hardly make sense that the Indians effectively relinquished all of their fishing rights by granting a merely nonexclusive right.

Even more to the point, the United States had previously used the "in common with" language in two treaties with Britain, including one signed in 1854, that dealt with fishing rights in certain waters adjoining the United States and Canada. Treaty of Oct. 20, 1818, 8 Stat. 248; Treaty of June 5, 1854, 10 Stat. 1089. As interpreted by the Department of State during the 19th century, these treaties gave each signatory country an "equal" and apportionable "share" of the take of fish in the treaty areas. See H. R. Ex. Doc. No. 84, 46th Cong., 2d Sess., 7 (1880); 5 American State Papers (For. Rel.) 528–529 (1823); J. Q. Adams, The Duplicate Letters, The Fisheries and the Mississippi 184–185 (1822).

ways exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a "reservation" of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters. Moreover, the phrasing of the clause quite clearly avoids placing each individual Indian on an equal footing with each individual citizen of the State. The referent of the "said Indians" who are to share the right of taking fish with "all citizens of the Territory" is not the individual Indians but the various signatory "tribes and bands of Indians" listed in the opening article of each treaty. Because it was the tribes that were given a right in common with non-Indian citizens, it is especially likely that a class right to a share of fish, rather than a personal right to attempt to land fish, was intended.

In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas. But our prior decisions provide an even more persuasive reason why this interpretation is not open to question. For notwithstanding the bitterness that this litigation has engendered, the principal issue involved is virtually a "matter decided" by our previous holdings.

The Court has interpreted the fishing clause in these treaties on six prior occasions. In all of these cases the Court placed a relatively broad gloss on the Indians' fishing rights and—more or less explicitly—rejected the State's "equal opportunity" approach; in the earliest and the three most recent cases, moreover, we adopted essentially the interpretation that the United States is reiterating here.

In *United States* v. *Winans, supra,* the respondent, having acquired title to property on the Columbia River and having obtained a license to use a "fish wheel"—a device capable of catching salmon by the ton and totally destroying a run of fish—asserted the right to exclude the Yakimas from one of their "usual and accustomed" places. The Circuit

Court for the District of Washington sustained respondent, but this Court reversed. The Court initially rejected an argument that is analogous to the "equal opportunity" claim now made by the State:

> "[I]t was decided [below] that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more. . . . How the treaty in question was understood may be gathered from the circumstances.
>
> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. . . . There was an exclusive right to fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other

> words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty." 198 U. S., at 380–381.

See also *Seufert Bros.*, 249 U. S., at 198, and *Tulee*, 315 U. S., at 684, both of which repeated this analysis, in holding that treaty Indians had rights, "beyond those which other citizens may enjoy," to fish without paying license fees in ceded areas and even in accustomed fishing places lying outside of the lands ceded by the Indians. See n. 22, *supra*.

But even more significant than the language in *Winans* is its actual disposition. The Court not only upheld the Indians' right of access to respondent's private property but also ordered the Circuit Court on remand to devise some "adjustment and accommodation" that would protect them from total exclusion from the fishery. 198 U. S., at 384. Although the accommodation it suggested by reference to the Solicitor General's brief in the case is subject to interpretation, it clearly included removal of enough of the fishing wheels to enable some fish to escape and be available to Indian fishermen upstream. Brief for United States, O. T. 1904, No. 180, pp. 54–56. In short, it assured the Indians a share of the fish.

In the more recent litigation over this treaty language between the Puyallup Tribe and the Washington Department of Game,[24] the Court in the context of a dispute over rights to the run of steelhead trout on the Puyallup River reaffirmed both of the holdings that may be drawn from *Winans*—the treaty guarantees the Indians more than simply the "equal opportunity" along with all of the citizens of the State to catch fish, and it in fact assures them some portion of each

[24] *Puyallup Tribe* v. *Washington Game Dept.*, 391 U. S. 392 (*Puyallup I*); *Washington Game Dept.* v. *Puyallup Tribe*, 414 U. S. 44 (*Puyallup II*); and *Puyallup Tribe* v. *Washington Game Dept.*, 433 U. S. 165 (*Puyallup III*).

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relevant run. But the three *Puyallup* cases are even more explicit; they clearly establish the principle that neither party to the treaties may rely on the State's regulatory powers or on property law concepts to defeat the other's right to a "fairly apportioned" share of each covered run of harvestable anadromous fish.

In *Puyallup I*, the Court sustained the State's power to impose nondiscriminatory regulations on treaty fishermen so long as they were "necessary" for the conservation of the various species. In so holding, the Court again explicitly rejected the equal-opportunity theory. Although nontreaty fishermen might be subjected to any reasonable state fishing regulation serving any legitimate purpose, treaty fishermen are immune from all regulation save that required for conservation.[25]

When the Department of Game sought to impose a total ban on commercial net fishing for steelhead, the Court held in *Puyallup II* that such regulation was not a "reasonable and necessary conservation measure" and would deny the Indians

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[25] Mr. Justice Douglas wrote for the Court:

"The right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State . . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." 391 U. S., at 398.

In describing the "appropriate standards" referred to, Mr. Justice Douglas continued:

"As to a 'regulation' concerning the time and manner of fishing . . . , the power of the State [is] measured by whether [the regulation is] 'necessary for the conservation of fish.' [*Tulee,*] 315 U. S., at 684.

"The measure of the legal propriety of those kinds of conservation measures is therefore distinct from the federal constitutional standard concerning the scope of the police power of a State. See *Ferguson* v. *Skrupa,* 372 U. S. 726 . . . ." *Id.,* at 402 n. 14.

See also *Antoine* v. *Washington,* 420 U. S., at 207–208; *Tulee,* 315 U. S., at 684; *Winans,* 198 U. S., at 384; *Ward* v. *Race Horse,* 163 U. S. 504.

their "fairly apportioned" share of the Puyallup River run. 414 U. S. 44, 45, 48. Although under the challenged regulation every individual fisherman would have had an equal opportunity to use a hook and line to land the steelhead, most of the fish would obviously have been caught by the 145,000 nontreaty licensees rather than by the handful of treaty fishermen. This Court vindicated the Indians' treaty right to "take fish" by invalidating the ban on Indian net fishing and remanding the case with instructions to the state courts to determine the portion of harvestable steelhead that should be allocated to net fishing by members of the tribe. *Id.*, at 48–49. Even if *Winans* had not already done so, this unanimous holding foreclosed the basic argument that the State is now advancing.

On remand, the Washington state courts held that 45% of the steelhead run was allocable to commercial net fishing by the Indians. We shall later discuss how that specific percentage was determined; what is material for present purposes is the recognition, upheld by this Court in *Puyallup III*, that the treaty secured the Tribe's right to a substantial portion of the run, and not merely a right to compete with nontreaty fishermen on an individual basis.[26]

Puyallup III also made it clear that the *Indians* could not rely on their treaty right to exclude others from access to certain fishing sites to deprive other citizens of the State of a "fair apportionment" of the runs. For although it is clear that the Tribe may exclude non-Indians from access to fishing

[26] Although some members of the Washington Supreme Court in their opinions in *Puyallup III* expressed the view that the treaties could not be interpreted as affording treaty fishermen an allocable share of the fish, *Department of Game* v. *Puyallup Tribe*, 86 Wash. 2d, at 674–681, 548 P. 2d, at 1066–1070; see *id.*, at 690–698, 548 P. 2d, at 1075–1080 (Rosellini, J., concurring); but see *id.*, at 688–690, 548 P. 2d, at 1074–1075 (Stafford, C. J., concurring in result), they recognized that any other interpretation would be inconsistent with "the express language on the face of [this Court's decision in] *Puyallup II* . . . ."

within the reservation, we unequivocally rejected the Tribe's claim to an untrammeled right to take as many of the steelhead running through its reservation as it chose. In support of our holding that the State has regulatory jurisdiction over on-reservation fishing, we reiterated Mr. Justice Douglas' statement for the Court in *Puyallup II* that the "Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." 414 U. S., at 49. It is in this sense that treaty and nontreaty fishermen hold "equal" rights. For neither party may deprive the other of a "fair share" of the runs.

Not only all six of our cases interpreting the relevant treaty language but all federal courts that have interpreted the treaties in recent times have reached the foregoing conclusions, see *Sohappy* v. *Smith*, 302 F. Supp. 899, 908, 911 (Ore. 1969) (citing cases), as did the Washington Supreme Court itself prior to the present litigation. *State* v. *Satiacum*, 50 Wash. 2d 513, 523–524, 314 P. 2d 400, 406 (1957). A like interpretation, moreover, has been followed by the Court with respect to hunting rights explicitly secured by treaty to Indians " 'in common with all other persons,' " *Antoine* v. *Washington*, 420 U. S. 194, 205–206, and to water rights that were merely implicitly secured to the Indians by treaties reserving land—treaties that the Court enforced by ordering an apportionment to the Indians of enough water to meet their subsistence and cultivation needs. *Arizona* v. *California*, 373 U. S. 546, 598–601, following *United States* v. *Powers*, 305 U. S. 527, 528–533; *Winters* v. *United States*, 207 U. S. 564, 576.

The purport of our cases is clear. Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other "citizens of the Territory." Both sides have

a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

V

We also agree with the Government that an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a "usual and accustomed" place into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount. Although this method of dividing the resource, unlike the right to *some* division, is not mandated by our prior cases, it is consistent with the 45%–55% division arrived at by the Washington state courts, and affirmed by this Court, in *Puyallup III* with respect to the steelhead run on the Puyallup River. The trial court in the *Puyallup* litigation reached those figures essentially by starting with a 50% allocation based on the Indians' reliance on the fish for their livelihoods and then adjusting slightly downward due to other relevant factors. App. to Pet. for Cert. in *Puyallup III*, O. T. 1976, No. 76–423, pp. C–56 to C–57. The District Court took a similar tack in this case, *i. e.*, by starting with a 50–50 division and adjusting slightly downward on the Indians' side when it became clear that they did not need a full 50%. 384 F. Supp., at 402, 416–417; 459 F. Supp., at 1101; 573 F. 2d, at 1129.

The division arrived at by the District Court is also consistent with our earlier decisions concerning Indian treaty rights to scarce natural resources. In those cases, after determining that at the time of the treaties the resource involved was necessary to the Indians' welfare, the Court typically ordered a trial judge or special master, in his discretion, to devise some apportionment that assured that the Indians' reasonable livelihood needs would be met. *Arizona*

v. *California, supra,* at 600; *Winters, supra.* See *Winans,* 198 U. S., at 384. This is precisely what the District Court did here, except that it realized that some ceiling should be placed on the Indians' apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty right of "all [other] citizens of the Territory."

Thus, it first concluded that at the time the treaties were signed, the Indians, who comprised three-fourths of the territorial population, depended heavily on anadromous fish as a source of food, commerce, and cultural cohesion. Indeed, it found that the non-Indian population depended on Indians to catch the fish that the former consumed. See *supra,* at 664–669, and n. 7. Only then did it determine that the Indians' present-day subsistence and commercial needs should be met, subject, of course, to the 50% ceiling. 384 F. Supp., at 342–343.

It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation. As in *Arizona* v. *California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%,[27] the minimum is not; the latter

[27] Because the 50% figure is only a ceiling, it is not correct to characterize our holding "as guaranteeing the Indians a specified percentage" of the fish. See POWELL, J., dissenting, *post,* at 697.

The logic of the 50% ceiling is manifest. For an equal division—especially between parties who presumptively treated with each other as equals—is suggested, if not necessarily dictated, by the word "common" as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances. *E. g.,* 2 American Law of Property § 6.5, p. 19 (A. Casner ed. 1952); E. Hopkins, Handbook on the Law of Real Property § 209, p. 336 (1896).

will, upon proper submissions to the District Court, be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.

Although the District Court's exercise of its discretion, as slightly modified by the Court of Appeals, see n. 18, *supra*, is in most respects unobjectionable, we are not satisfied that all of the adjustments it made to its division are consistent with the preceding analysis.

The District Court determined that the fish taken by the Indians on their reservations should not be counted against their share. It based this determination on the fact that Indians have the exclusive right under the treaties to fish on their reservations. But this fact seems to us to have no greater significance than the fact that some nontreaty fishermen may have exclusive access to fishing sites that are not "usual and accustomed" places. Shares in the fish runs should not be affected by the place where the fish are taken. Cf. *Puyallup III*, 433 U. S., at 173–177.[28] We therefore disagree with the District Court's exclusion of the Indians' on-reservation catch from their portion of the runs.[29]

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[28] This Court's decision in *Puyallup III*, which approved state regulation of on-reservation fishing in the interest of conservation, was issued after the District Court excluded the Indians' on-reservation take and the Court of Appeals affirmed. See 520 F. 2d, at 690.

[29] A like reasoning requires the fish taken by treaty fishermen off the reservations and at locations other than "usual and accustomed" sites, see n. 17, *supra*, to be counted as part of the Indians' share. Of course, the District Court, in its discretion, may determine that so few fish fit into this, or any other, category (*e. g.*, "take-home" fish caught by nontreaty commercial fishermen for personal use) that accounting for them individ-

This same rationale, however, validates the Court-of-Appeals-modified equitable adjustment for fish caught outside the jurisdiction of the State by nontreaty fishermen from the State of Washington. See n. 18, *supra*, and accompanying text. So long as they take fish from identifiable runs that are destined for traditional tribal fishing grounds, such persons may not rely on the location of their take to justify excluding it from their share. Although it is true that the fish involved are caught in waters subject to the jurisdiction of the United States, rather than of the State, see 16 U. S. C. §§ 1811, 1812, the persons catching them are nonetheless "citizens of the Territory" and as such the beneficiaries of the Indians' reciprocal grant of land in the treaties as well as the persons expressly named in the treaties as sharing fishing rights with the Indians. Accordingly, they may justifiably be treated differently from nontreaty fishermen who are not citizens of Washington. The statutory provisions just cited are therefore important in this context only because they clearly place a responsibility on the United States, rather than the State, to police the take of fish in the relevant waters by Washington citizens insofar as is necessary to assure compliance with the treaties.

On the other hand, as long as there are enough fish to satisfy the Indians' ceremonial and subsistence needs, we see no justification for the District Court's exclusion from the treaty share of fish caught for these purposes. We need not now decide whether priority for such uses would be required in a period of short supply in order to carry out the purposes of the treaty. See 384 F. Supp., at 343. For present purposes, we merely hold that the total catch—rather than the commercial catch—is the measure of each party's right.[30]

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ually is unnecessary, and that an estimated figure may be relied on in making the annual computation. Indeed, if the amount is truly *de minimis*, no accounting at all may be required.

[30] The Government suggests that the District Court's exclusion of the "take-home" catch of nontreaty fishermen from the nontreaty share

Accordingly, any fish (1) taken in Washington waters or in United States waters off the coast of Washington, (2) taken from runs of fish that pass through the Indians' usual and accustomed fishing grounds, and (3) taken by either members of the Indian tribes that are parties to this litigation, on the one hand, or by non-Indian citizens of Washington, on the other hand, shall count against that party's respective share of the fish.

VI

Regardless of the Indians' other fishing rights under the treaties, the State argues that an agreement between Canada and the United States pre-empts their rights with respect to the sockeye and pink salmon runs on the Fraser River.

In 1930, the United States and Canada agreed that the catch of Fraser River salmon should be equally divided between Canadian and American fishermen. Convention of May 26, 1930, 50 Stat. 1355, as amended by [1957] 8 U. S. T. 1058. To implement this agreement, the two Governments established the International Pacific Salmon Fisheries Commission (IPSFC). Each year that Commission proposes regulations to govern the time, manner, and number of the catch by the fishermen of the two countries; those regulations become effective upon approval of both countries.

In the United States, pursuant to statute and Presidential designation, enforcement of those regulations is vested in the

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makes up for any losses to those fishermen occasioned by the exclusion of the Indians' ceremonial and subsistence take. We see nothing in the District Court's findings to verify this allegation, see 384 F. Supp., at 343, although the District Court may wish to address the issue in this light on remand.

Although there is some discussion in the briefs concerning whether the treaties give Indians the same right to take hatchery-bred fish as they do to take native fish, the District Court has not yet reached a final decision on this issue, see 459 F. Supp., at 1072–1085, and it is not therefore fairly subsumed within our grant of certiorari. See *Puyallup III*, 433 U. S., at 177 n. 17.

National Marine Fisheries Service, which, in turn, may authorize the State of Washington to act as the enforcing agent. Sockeye Salmon or Pink Salmon Fishing Act of 1947, 61 Stat. 511, as amended, 16 U. S. C. § 776 *et seq.* (hereinafter Sockeye Act). For many years Washington has accepted this responsibility and enacted IPSFC regulations into state statutory law.

The Fraser River salmon run passes through certain "usual and accustomed" places of treaty tribes. The Indians have therefore claimed a share of these runs. Consistently with its basic interpretation of the Indian treaties, the District Court in its original decision held that the tribes are entitled to up to one-half of the American share of any run that passes through their "usual and accustomed" places. To implement that holding, the District Court also entered an order authorizing the use by Indians of certain gear prohibited by IPSFC regulations then in force. 384 F. Supp., at 392–393, 411. The Court of Appeals affirmed, 520 F. 2d, at 689–690, and we denied certiorari. 423 U. S. 1086.

In later proceedings commenced in 1975, the State of Washington contended in the District Court that any Indian rights to Fraser River salmon were extinguished either implicitly by the later agreement with Canada or more directly by the IPSFC regulations promulgated pursuant to those agreements insofar as they are inconsistent with the District Court's order. The State's claim was rejected by the District Court and the Court of Appeals. 459 F. Supp., at 1050–1056; 573 F. 2d, at 1120–1121.

First, we agree with the Court of Appeals that the Convention itself does not implicitly extinguish the Indians' treaty rights. Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights, *e. g., Menominee Tribe* v. *United States,* 391 U. S. 404, and there is no reason to do so here. Indeed, the Canadian Government has long exempted Canadian Indians from regu-

lations promulgated under the Convention and afforded them special fishing rights.

We also agree with the United States that the conflict between the District Court's order and IPSFC does not present us with a justiciable issue. The initial conflict occasioned by the regulations for the 1975 season has been mooted by the passage of time, and there is little prospect that a similar conflict will revive and yet evade review. See *DeFunis* v. *Odegaard*, 416 U. S. 312, 316. Since 1975, the United States, in order to protect the Indian rights, has exercised its power under Art. VI of the Convention and refused to give the necessary approval to those portions of the IPSFC regulations that affected Indian fishing rights. Those regulations have accordingly not gone into effect in the United States. The Indians' fishing rights and responsibilities have instead been the subject of separate regulations promulgated by the Interior Department, under its general Indian powers, 25 U. S. C. §§ 2, 9; see 25 CFR § 256.11 *et seq.* (1978); 50 CFR § 371.1 *et seq.* (1978); 25 CFR § 256.11 *et seq.* (1979), and enforced by the National Marine Fisheries Service directly, rather than by delegation to the State. The District Court's order is fully consistent with those regulations.[31] To the extent that any Washington State statute imposes any conflicting obligations, the statute is without effect under the Sockeye Act and

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[31] Although the IPSFC has refused to accede to the suggestions of the United States that special regulations be promulgated to cover the Indian fisheries, we are informed by the Solicitor General that the Canadian Government has no objection to those suggestions, has unilaterally implemented similar rules on behalf of its own Indians, and has expressed no dissatisfaction with the unilateral actions taken by the United States in this regard. Brief for United States 40 n. 26.

Because the Department of the Interior regulations assure that no disproportion will occur, the equitable adjustment ordered by the District Court to cover the possibility that IPSFC regulations would result in a disproportionate nontreaty take will not be effectuated. We accordingly have no issue before us concerning the validity of that adjustment.

must give way to the federal treaties, regulations, and decrees. *E. g., Missouri* v. *Holland,* 252 U. S. 416, 432.

VII

In addition to their challenges to the District Court's basic construction of the treaties, and to the scope of its allocation of fish to treaty fishermen, the State and the commercial fishing associations have advanced two objections to various remedial orders entered by the District Court.[32] It is claimed that

[32] The associations advance a third objection as well—that the District Court had no power to enjoin individual nontreaty fishermen, who were not parties to its decisions, from violating the allocations that it has ordered. The reason this issue has arisen is that state officials were either unwilling or unable to enforce the District Court's orders against nontreaty fishermen by way of state regulations and state law enforcement efforts. Accordingly, nontreaty fishermen were openly violating Indian fishing rights, and, in order to give federal law enforcement officials the power via contempt to end those violations, the District Court was forced to enjoin them. 459 F. Supp., at 1043, 1098–1099, 1113–1117. The commercial fishing organizations, on behalf of their individual members, argue that they should not be bound by these orders because they were not parties to (although the associations all did participate as *amici curiae* in) the proceedings that led to their issuance.

If all state officials stand by the Attorney General's representations that the State will implement the decision of this Court, see nn. 34 and 35, *infra,* this issue will be rendered moot because the District Court no longer will be forced to enforce its own decisions. Nonetheless, the issue is still live since state implementation efforts are now at a standstill and the orders are still in effect. Accordingly, we must decide it.

In our view, the commercial fishing associations and their members are probably subject to injunction under either the rule that nonparties who interfere with the implementation of court orders establishing public rights may be enjoined, *e. g., United States* v. *Hall,* 472 F. 2d 261 (CA5 1972), cited approvingly in *Golden State Bottling Co.* v. *NLRB,* 414 U. S. 168, 180, or the rule that a court possessed of the res in a proceeding *in rem,* such as one to apportion a fishery, may enjoin those who would interfere with that custody. See *Vendo Co.* v. *Lektro-Vend Corp.,* 433 U. S. 623, 641. But in any case, these individuals and groups are citizens of the State of Washington, which was a party to the relevant proceedings, and "they, in their common public rights as citizens of the State, were represented by

the District Court has ordered a state agency to take action that it has no authority to take as a matter of state law and that its own assumption of the authority to manage the fisheries in the State after the state agencies refused or were unable to do so was unlawful.[33]

These objections are difficult to evaluate in view of the representations to this Court by the Attorney General of the State that definitive resolution of the basic federal question of construction of the treaties will both remove any state-law impediment to enforcement of the State's obligations under the treaties,[34] and enable the State and Fisheries to carry

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the State in those proceedings, and, like it, were bound by the judgment." *Tacoma* v. *Taxpayers*, 357 U. S. 320, 340–341. Moreover, a court clearly may order them to obey that judgment. See *Golden State Bottling, supra,* at 179–180.

[33] The State has also argued that absent congressional legislation the treaties involved here are not enforceable. This argument flies directly in the face of Art. XIII of the treaties which states that they "shall be obligatory on the contracting parties as soon as [they are] ratified by the President and Senate of the United States." Moreover, the argument was implicitly rejected in *Winans* and our ensuing decisions regarding these treaties, all of which assumed that the treaties are self-enforcing. *E. g., Puyallup I,* 391 U. S., at 397–398.

Significantly, Congress thrice rejected efforts in the early 1960's to terminate the Indians' fishing rights under these treaties. See S. J. Res. 170 and 171, 88th Cong., 2d Sess. (1964); H. J. Res. 48, 88th Cong., 1st Sess. (1963); H. J. Res. 698, 87th Cong., 2d Sess. (1962).

[34] In his brief, the Attorney General represented:

"If this Court now concludes that Indian treaty fishermen and all other fishermen are not members of the same class with respect to an allocation of fishery, it will thereby lay the foundation for the validity under state law of a separate classification of treaty Indian fishermen for the purpose of allocation. We would respectfully submit that if the Court rejects our earlier argument and finds that treaty Indian fishermen are a special class for allocation purposes, such a conclusion would remove the impediment found by the Washington Supreme Court to the exercise of necessary regulatory power by the Department of Fisheries to allocate between Indian and non-Indian fishermen.

. . . . .

"Fisheries will be able to comply with the Court's decision in this

out those obligations.[35] Once the state agencies comply, of course, there would be no issue relating to federal authority to order them to do so or any need for the District Court to continue its own direct supervision of enforcement efforts.

The representations of the Attorney General are not binding on the courts and legislature of the State, although we assume they are authoritative within its executive branch. Moreover, the State continues to argue that the District Court exceeded its authority when it assumed control of the fisheries in the State, and the commercial fishing groups

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case even if it requires some type of allocation of the fishery." Brief for State of Washington 99.

See also *Department of Game* v. *Puyallup Tribe*, 86 Wash. 2d 664, 681, 684–688, 548 P. 2d 1058, 1070, 1072–1074 (1976), in which the Washington Supreme Court held that the Department of Game had authority to allocate a certain portion of the steelhead trout run on the Puyallup River to treaty fishermen.

[35] According to the Attorney General:

"The State of Washington and its Department of Fisheries cannot emphasize too strongly that they do not propose to inhibit the enforcement of proper federal court orders. . . .

. . . . . .

"Whatever the decision of this Court, the state will implement it. The state believes that after a decision by this Court it will be in a position to comply with District Court orders, if the same are necessary to comply with this Court's decision. We do not believe the state courts could or would take a different point of view: We are confident that they will accede to this Court's interpretation of the treaties in the future just as they have in the past, as this Court expressly found in *Puyallup III*, [433 U. S.,] at 177." Brief for State of Washington 95, 96.

We note the omission of the same firm representation on behalf of the Game Department. Although the history of that agency is not nearly as favorable as that of Fisheries with respect to attempting to comply with the District Court's order, *e. g.*, 384 F. Supp., at 395, 398; 459 F. Supp., at 1043, 1045, 1099, we assume that this omission stems from the fact that only Fisheries was named as a party in the litigation in the state courts regarding the state agencies' authority to comply with the District Court's order. See 88 Wash. 2d, at 679, 565 P. 2d, at 1152. See also *Department of Game* v. *Puyallup Tribe*, discussed in n. 34, *supra*.

continue to argue that the District Court may not order the state agencies to comply with its orders when they have no state-law authority to do so. Accordingly, although adherence to the Attorney General's representations by the executive, legislative, and judicial officials in the State would moot these two issues, a brief discussion should foreclose the possibility that they will not be respected. State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution. *Cooper* v. *Aaron*, 358 U. S. 1; *Ableman* v. *Booth*, 21 How. 506. It is also clear that Game and Fisheries, as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. *E. g., North Carolina Board of Education* v. *Swann*, 402 U. S. 43; *Griffin* v. *County School Board*, 377 U. S. 218; *Tacoma* v. *Taxpayers*, 357 U. S. 320. Once again the answer to a question raised by this litigation is largely dictated by our *Puyallup* trilogy. There, this Court mandated that state officers make precisely the same type of allocation of fish as the District Court ordered in this case. See *Puyallup III*, 433 U. S., at 177.

Whether Game and Fisheries may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful. But the District Court may prescind that problem by assuming direct supervision of the fisheries if state recalcitrance or state-law barriers should be continued. It is therefore absurd to argue, as do the fishing associations, both that the state agencies may not be ordered to implement the decree and also that the District Court may not itself issue detailed remedial orders as a substitute for state supervision. The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of

federal law found by the court. *E. g., Hutto* v. *Finney,* 437 U. S. 678; *Milliken* v. *Bradley,* 433 U. S. 267, 280–281, 290; *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15. Even if those orders may have been erroneous in some respects, all parties have an unequivocal obligation to obey them while they remain in effect.

In short, we trust that the spirit of cooperation motivating the Attorney General's representation will be confirmed by the conduct of state officials. But if it is not, the District Court has the power to undertake the necessary remedial steps and to enlist the aid of the appropriate federal law enforcement agents in carrying out those steps. Moreover, the comments by the Court of Appeals strongly imply that it is prepared to uphold the use of stern measures to require respect for federal-court orders.[36]

The judgments of the Court of Appeals for the Ninth Circuit and the Supreme Court of the State of Washington are vacated and the respective causes are remanded to those courts for further proceedings not inconsistent with this opinion, except that the judgment in *United States* v. *Washington,* 573 F. 2d 1118 (the *International Fisheries* case) is affirmed.

So ordered.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting in part.

I join Parts I–III of the Court's opinion. I am not in agreement, however, with the Court's interpretation of the treaties

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[36] "The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice." 573 F. 2d 1123, 1126 (CA9 1978).

negotiated in 1854 and 1855 with the Indians of the Washington Territory. The Court's opinion, as I read it, construes the treaties' provision "of taking fish . . . in common" as guaranteeing the Indians a specified percentage of the runs of the anadromous fish passing land upon which the Indians traditionally have fished. Indeed, it takes as a starting point for determining fishing rights an equal division of these fish between Indians and non-Indians. *Ante*, at 685 *et seq.* As I do not believe that the language and history of the treaties can be construed to support the Court's interpretation, I dissent.

I

At issue in these cases is the meaning of language found in six similar Indian treaties negotiated and signed in 1854 and 1855.[1] Each of the treaties provides substantially that "[*t*]*he right of taking fish*, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory*, and of erecting temporary houses for the purpose of curing."[2] The question before us is whether this "common" fishing right is a right only of access to usual and accustomed fishing sites for the purpose of fishing there, or includes the greater right to exclude others from taking a particular portion of the fish that pass through the sites. As the Court observes, at the time the treaties were signed there was no need to address this question, for the surfeit of fish made lack of access to fishing areas the only constraint upon supply. Nonetheless, I believe that the compelling inference to be drawn from the language and history of the treaties is that the Indians sought and retained only the right to go to

[1] Treaty of Medicine Creek, 10 Stat. 1132; Treaty of Point Elliott, 12 Stat. 927; Treaty of Point No Point, 12 Stat. 933; Treaty with the Makahs, 12 Stat. 939; Treaty with the Yakamas, 12 Stat. 951; Treaty of Olympia, 12 Stat. 971.

[2] Treaty of Medicine Creek, 10 Stat. 1133 (emphasis supplied). There were some slight, immaterial variations in the language used. See, *e. g.*, Treaty with the Yakamas, quoted *infra*, at 698.

their accustomed fishing places and there to fish along with non-Indians. In addition, the Indians retained the exclusive right to take fish on their reservations, a right not involved in this litigation. In short, they have a right of access to fish.

Nothing in the language of the treaties indicates that any party understood that constraints would be placed on the amount of fish that anyone could take, or that the Indians would be guaranteed a percentage of the catch. Quite to the contrary, the language confers upon non-Indians precisely the same right to fish that it confers upon Indians, even in those areas where the Indians traditionally had fished. *United States* v. *Winans*, 198 U. S. 371 (1905). As it cannot be argued that Congress intended to guarantee non-Indians any specified percentage of the available fish, there is neither force nor logic to the argument that the same language—the "right of taking fish"—does guarantee such a percentage to Indians.

This conclusion is confirmed by the language used in the treaty negotiated with the Yakima Tribe, which explicitly includes what apparently is implicit in each of the treaties: the Indians' right to take fish on their reservations is exclusive. Thus, the Yakima Treaty provides that "[t]he exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . ." 12 Stat. 953. There is no reason apparent from the language used in the treaties why the "right of taking fish" should mean one thing for purposes of the exclusive right of reservation fishing and quite another for purposes of the "common" right of fishing at usual and accustomed places. Since the Court interprets the right of taking fish in common to be an entitlement to half of the entire catch taken from fisheries passing the Indians' traditional fishing grounds, it therefore should follow that the

Court would interpret the exclusive right of taking fish to be an entitlement to *all* of the fish taken from fisheries passing the Indians' reservations. But the Court apparently concedes that this exclusive right is not of such Draconian proportions. Indeed, the Court would reduce the Indians' 50% portion by those fish caught on the reservation. The more reasonable conclusion, therefore, is that when the Indians and Governor Stevens agreed upon a "right of taking fish," they understood this right to be one of access to fish—exclusive access with respect to fishing places on the reservation, and common access with respect to fishing places off the reservation.[3]

In addition to the language of the treaties, the historical setting in which they were negotiated supports the inference that the fishing rights secured for the Indians were rights of access alone. The primary purpose of the six treaties negotiated by Governor Stevens was to resolve growing disputes between the settlers claiming title to land in the Washington Territory under the Land Donation Act of 1850, 9 Stat. 437, and the Indians who had occupied the land for generations. Under the bargain struck in the treaties, the Indians ceded their claims to vast tracts of land, retaining only certain specified areas as reservations, where they would have exclusive rights of possession and use. In exchange, the Indian tribes were given substantial sums of money and were promised various forms of aid. See, *e. g.*, Treaty of Medicine Creek, 10 Stat. 1132. By thus separating the Indians from the settlers it was hoped that friction could be minimized.

[3] Indeed, if the Court's interpretation of the treaties were correct, then the exclusive right with respect to reservation fishing would be largely superfluous. If the Indians had the right to 50%, and no more, of the fish irrespective of where they are caught, then it hardly would be of any great value to them that they could keep others from taking fish from locations on the reservation. The most reasonable way to interpret the exclusive right of reservation fishing so that it was of value, therefore, is as a special right of access.

The negotiators apparently realized, however, that restricting the Indians to relatively small tracts of land might interfere with their securing food. See letter of George Gibbs to Captain M'Clellan, App. 326 ("[The Indians] require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish"). This necessary "liberty of motion" was jeopardized by the title claims of the settlers whose land abutted—or would abut—the waterways from which fish traditionally had been caught. Thus, in Governor Stevens' report to the Commissioner of Indian Affairs, he noted the tension between the land rights afforded settlers under the 1850 Land Donation Act and the Indians' need to have some access to the fisheries. Although he expressed the view that "[i]t never could have been the intention of Congress that Indians should be excluded from their ancient fisheries," he noted that "no condition to this effect was inserted in the donation act," and therefore recommended the question "should be set at rest by law." Report of Governor Stevens to the Commissioner of Indian Affairs, App. 327. Viewed within this historical context, the common fishing right reserved to the Indians by the treaties of 1854 and 1855 could only have been the right, over and above their exclusive fishing right on their reservations, to roam off the reservations in order to reach fish at the locations traditionally used by the Indians for this purpose. On the other hand, there is no historical indication that any of the parties to the treaties understood that the Indians would be specifically guaranteed some set portion of the fisheries to which they traditionally had had access.

II

Prior decisions of this Court have prevented the dilution of these treaty rights, but none has addressed the issue now before us. I read these decisions as supporting the interpretation set forth above. This is particularly true of *United States* v. *Winans, supra,* the case most directly relevant. In

that case a settler had constructed several fish wheels in the Columbia River. These fish wheels were built at locations where the Indians traditionally had fished, and "'necessitate[d] the exclusive possession of the space occupied by the wheels,'" 198 U. S., at 380, thereby interfering with the Indians' treaty right of access to fish. This Court reviewed in some detail the precise nature of the Indians' fishing rights under the Yakima Treaty, and concluded:

> "[The treaties] reserved rights . . . to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved 'in common with citizens of the Territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, *the Indians were given a right in the land—the right of crossing it to the river*—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty." *Id.*, at 381 (emphasis added).

The Court thus viewed these treaties as intended to "giv[e] a right in the land"—a "servitude" upon all non-Indian land—to enable Indians to fish "in common with citizens of the Territory." The focus was on access to the traditional fishing areas for the purpose of enjoying the "right of fishing." *Ibid.* The *Winans* Court concluded, on the facts before it, that the right of access to fish in these areas had been abridged. It stated that "[i]n the actual taking of

fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them *exclusive possession of the fishing places,* as it is admitted a fish wheel does." *Id.*, at 382 (emphasis added). Thus, *Winans* was decided solely upon the basis of a treaty-secured right of access to fish. Moreover, the Court's analysis of the treaty right at issue in *Winans* strongly indicates that nothing more than a right of access fairly could be inferred from the treaty.[4]

Nor do the *Puyallup* cases interpret the treaties to require that any specified proportion of the catch be reserved for Indians. Indeed, *Puyallup Tribe* v. *Washington Game Dept.*, 391 U. S. 392 (1968) (*Puyallup I*), consistently with *Winans*, described the right of Indians under the treaties as "the right to fish 'at all usual and accustomed places.'" 391 U. S., at 398.[5] The issue before the Court in *Puyallup I* was the extent to which the State could regulate fishing. It held:

"[T]he 'right' to fish outside the reservation was a treaty

[4] The Government's brief in *Winans*, cited approvingly by the Court in that case, indicates that the Government also understood the treaty to guarantee nothing more than access rights to traditional fishing locations. In that brief, the Government advocated only "a way of easy access, free ingress and egress to and from the fishing grounds." Brief for Appellants, O. T. 1904, No. 180, p. 56.

This interpretation of *Winans* was unequivocally affirmed by the Court a short time later in *Seufert Bros. Co.* v. *United States*, 249 U. S. 194 (1919). At issue in that case was whether Indians from the Yakima Nation had the right under their treaty to cross the Columbia River and fish from the south bank, which admittedly had belonged to other tribes at the time of the treaty. The Court viewed *Seufert*, a case unquestionably involving only the right of access, to be squarely controlled by its earlier decision in *Winans*. 249 U. S., at 198. Moreover, the Court reaffirmed its view that the effect of the reservation of common fishing rights to the Indians amounted to a servitude. *Id.*, at 199.

[5] The treaty right was repeatedly referred to in *Puyallup I* as a "right to fish." This phrase was used no less than seven times in the course of the opinion, with no distinction being made between the right "to fish" and the right "of taking fish." 391 U. S., at 397–399.

> 'right' that could not be qualified or conditioned by the State. But 'the time and manner of fishing . . . necessary for the conservation of fish,' not being defined or established by the treaty, were within the reach of state power." *Id.*, at 399.

The Court today finds support for its views in *Puyallup I* because the Court there recognized that, apart from conservation measures, the State could not impose restrictive regulations on the treaty rights of Indians. But it does not follow from this that an affirmative right to a specified percentage of the catch is guaranteed by the treaties to Indians or to non-Indians, for the Court misapprehends the nature of the basic right sought to be preserved by Congress. This, as noted above, was a right of the Indians to reach their usual and accustomed fishing areas. Put differently, this right, described in *Winans* as a servitude or right over land not owned by the Indians, entitles the Indians to trespass on any land when necessary to reach their traditional fishing areas, and is a right not enjoyed by non-Indian residents of the area.

In permitting the State to place limitations on the Indians' access rights when conservation so requires, the Court went further in *Puyallup I* and suggested that even regulations thus justified would have to satisfy the requirements of "equal protection implicit in the phrase 'in common with.'" 391 U. S., at 403. Accordingly, in *Washington Game Dept.* v. *Puyallup Tribe*, 414 U. S. 44 (1973) (*Puyallup II*), we considered whether the conservation measures taken by the State had been evenhanded in the treatment of the Indians. At issue was a Washington State ban on all net fishing—by both Indians and non-Indians—for steelhead trout in the Puyallup River. According to testimony before the trial court, the annual run of steelhead trout in the Puyallup River was between 16,000 and 18,000, while unlimited sport fishing would result in the taking of between 12,000 and 14,000 steelhead annually. Because the escape of at least 25% of the entire

run was required for hatcheries and spawning, the sport fishing totally pre-empted all commercial fishing by Indians. The State therefore imposed a ban on all net fishing. The Indians claimed that this ban amounted to an improper subordination of their treaty rights to the privilege of recreational fishing enjoyed by non-Indians.

We held in *Puyallup II* that the ban on net fishing, as it applied to Indians covered by treaty, was an infringement of their rights. The State in the name of conservation was discriminating against the Indians "because all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians, is allowed." *Id.*, at 48. Because "[o]nly an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species," *ibid.*, we remanded to the Washington courts for a fair apportionment of the steelhead run between Indian net fishing and non-Indian sport fishing.

Relying upon the reference in *Puyallup II* to "apportionment," the Court expansively reads the decision in that case as strongly implying, if not holding, that the catch at Indians' "accustomed" fishing sites must be apportioned between Indian and non-Indian fishermen. This view certainly is not a necessary reading of *Puyallup II*. Indeed, I view it as a quite unjustified extension of that case. *Puyallup II* addressed an extremely narrow situation: where there had been "discrimination" by state regulations under which "all Indian net fishing [was] barred and only hook-and-line fishing entirely pre-empted by non-Indians, [was] allowed." *Ibid.* In any event, to the extent language in *Puyallup II* may be read as supporting some general apportionment of the catch, it is dictum that is plainly incompatible with the language and historical understanding of these treaties.[6]

[6] Having decided that some regulation was required, but that the treaty forbade the State to choose to regulate only Indian fishing for conservation

Emerging from our decisions in *Winans, Puyallup I,* and *Puyallup II,* therefore, is the proper approach to interpretation of the Indians' common fishing rights at the present time, when demand outstrips supply. The Indians have the right to go to their traditional fishing grounds to fish. Once there, they cannot be restricted in their methods or in the size of their take, save insofar as restrictions are required for conserving the fisheries from which they draw. Even in situations where such regulations are required, however, the State must be evenhanded in limiting Indian and non-Indian fishing activity. It is not free to make the determination—apparently made by Washington with respect to the ban on net fishing in the Puyallup River—that Indian fishing rights will be totally subordinated to the interests of non-Indians.[7]

III

In my view, the District Court below—and now this Court—has formulated an apportionment doctrine that cannot be squared with the language or history of the treaties, or indeed with the prior decisions of this Court. The application of this doctrine, and particularly the construction of the term "in common" as requiring a basic 50–50 apportionment, is likely to result in an extraordinary economic windfall to

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purposes, we remanded for an apportionment between net fishing and sport fishing. *Puyallup Tribe* v. *Washington Game Dept.,* 433 U. S. 165 (1977) (*Puyallup III*), is of little assistance in deciding the issue in the present cases. The Court in that case decided only that the regulations permitted in *Puyallup I* could be applied against Indian fishing on the reservations, as well as off them.

[7] Because it is admitted that the Indians at all times have taken substantial numbers of fish at their traditional fishing places, I do not consider whether a monopolization of all of the fish by the non-Indians would violate the spirit of the Indians' treaty right of access. Of course, if state conservation regulations were to operate discriminatorily to deny fish to Indians, the Court's decision in *Puyallup II* would apply.

Indian fishermen in the commercial fish market by giving them a substantial position in the market wholly protected from competition from non-Indian fishermen.[8] Indeed, non-Indian fishermen apparently will be required from time to time to stay out of fishing areas completely while Indians catch their court-decreed allotment. In sum, the District Court's decision will discriminate quite unfairly against non-Indians.[9]

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[8] The Court apparently sees this windfall as being necessary for the Indians, for it concludes that "in light of the far superior numbers, capital resources, and technology of the non-Indians, the concept of the Indians' 'equal *opportunity*' to take advantage of a scarce resource is likely in practice to mean that the Indians' 'right of taking fish' will net them virtually no catch at all." *Ante*, at 677 n. 22. But if the situation of the Indians in the Pacific Northwest requires that special provisions be made for their livelihood, this Court should not enact these provisions by reforming a bargain struck more than 100 years ago. Nor should the cost of compensating for any disadvantage the Indians may suffer, or have suffered, be borne solely by the commercial fishermen of the State of Washington—a fraction of the people who have benefited from the population imbalance. This is a problem for resolution by Congress. It has the basic responsibility for making sure that Indians are not discriminated against, and that their rights are fully protected. In the exercise of this responsibility, Congress could pursue various avenues for relief of any perceived discrimination or disadvantage. It could, for example, provide for Indian fishermen the modern technology and capital resources that they lack, thereby enabling them to compete on an equal basis with non-Indian fishermen. Moreover, a legislation of this problem can protect the interests of Indians without imposing substantially the entire cost upon non-Indian fishermen of the State of Washington.

[9] In addition to the burdens placed upon non-Indian fishermen, the Court's decision is likely to prove difficult to enforce fairly and effectively. To date, the District Court has had to resort to the outer limits of its equitable powers in order to enforce its decree. This has included taking over supervision of all of the commercial fishing in the Puget Sound area, ordering the creation of a telephone "hot line" that fishermen can use to determine when and where they may legally fish, and ordering United States Marshals to board fishing craft and inspect for violations

To be sure, if it were necessary to construe the treaties to produce these results, it would be our duty so to construe them. But for the reasons stated above, I think the Court's construction virtually ignores the historical setting and purposes of the treaties, considerations that bear compellingly upon a proper reading of their language. Nor do the prior decisions of this Court support or justify what seems to me to be a substantial reformation of the bargain struck with the Indians in 1854–1855.

I would hold that the treaties give to the Indians several significant rights that should be respected. As made clear in *Winans*, the purpose of the treaties was to assure to Indians the right of access over private lands so that they could continue to fish at their usual and accustomed fishing grounds. Indians also have the exclusive right to fish on their reservations, and are guaranteed enough fish to satisfy their ceremonial and subsistence needs. Moreover, as subsequently construed, the treaties exempt Indians from state regulation (including the payment of license fees) except as necessary

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of the court's preliminary injunction. Indeed, in his response to the petition for certiorari in the present case, the Solicitor General set forth in some detail the extraordinary difficulty the Government has had in enforcing the District Court's decrees, saying:

"[T]he default of the state government has required the United States to concentrate a disproportionate amount of its limited fisheries enforcement personnel on what is essentially a local enforcement problem. Agents of the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Marshals Service, and the Coast Guard have been diverted from their regular duties to assist the district court in implementing the Indians' treaty rights. This has resulted in a reduction in the federal fisheries services available for the rest of the country and for the enforcement of the ocean fisheries programs governed by the Fishery Conservation and Management Act of 1976." Brief for United States on Petition for Certiorari in Nos. 78–119 and 78–139, p. 20.

These problems, it seems to me, will be exacerbated by a formula apportionment such as that ordered by the Court.

for conservation in the interest of all fishermen. Finally, under *Puyallup II*, it is settled that even a facially neutral conservation regulation is invalid if its effect is to discriminate against Indian fishermen. These rights, privileges, and exemptions—possessed only by Indians—are quite substantial. I find no basis for according them additional advantages.

Per Curiam

MORLAND ET AL. *v.* SPRECHER, JUDGE, UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

No. 78–1904. Decided July 2, 1979

Held: Petitioners' motion for leave to file a petition for a writ of mandamus to compel the Court of Appeals to expedite their appeal from the District Court's preliminary injunction restraining petitioners from publishing an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It," is denied. Petitioners effectively relinquished whatever right they might otherwise have had to expedited consideration by choosing not to argue to the Court of Appeals for expedited review based on an alleged unconstitutional prior restraint against publication of information subject to First Amendment protection until long after such argument had ripened, and until they had taken close to three months to prepare their own brief on the merits under a briefing schedule ordered by the Court of Appeals to which petitioners had not objected.

PER CURIAM.

On March 26, 1979, the District Court for the Western District of Wisconsin entered a preliminary injunction restraining petitioners from publishing or otherwise disseminating an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It." On June 21, 1979, one judge of the Court of Appeals for the Seventh Circuit denied in part petitioners' motion for an expedited hearing of their appeal. That hearing is currently set for September 10, 1979.

Petitioners seek a writ of mandamus to the Court of Appeals ordering it to expedite their appeal. They claim that parties who have been enjoined from engaging in constitutionally protected speech have a right to prompt appellate review of that injunction. See *National Socialist Party* v. *Skokie*, 432 U. S. 43 (1977). See also *Nebraska Press Assn.* v. *Stuart*, 423

U. S. 1319 (1975) (BLACKMUN, J., in chambers); *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1327 (1975) (BLACKMUN, J., in chambers). In view of their conduct in prosecuting their appeal before the Court of Appeals, however, we conclude that petitioners have effectively relinquished whatever right they might otherwise have had to expedited consideration.

The District Court's preliminary injunction was entered on March 26, 1979, yet petitioners waited until June 15, 1979, to file a meaningful motion for expedited review before the Court of Appeals. Prior to that time, petitioners (1) waited two weeks after the District Court entered its injunction before filing a notice of appeal, and then waited another week before proposing that the appeal be accorded special scheduling treatment; (2) in that proposal, suggested an 89-day briefing schedule that—as they knew—provided for oral argument in the case, at the earliest, 10 days after the Court of Appeals' summer recess was to begin; (3) at a subsequent prehearing conference held by the Senior Staff Attorney of the Court of Appeals, asked that the briefing and argument schedule they had originally proposed be extended by an additional three weeks, *i. e.*, into the latter half of July; (4) participated in a second prehearing conference in which a panel of the Court of Appeals discussed scheduling with the parties, and did not object either to the briefing schedule ordered by the court or to the September 10 hearing date; and (5) pursuant to the schedule discussed at the conference, took 81 days to file their opening brief on the merits. It was only upon the filing of that brief on June 15, 1979 (just four days before the Seventh Circuit's scheduled recess was to begin), that they sought expedition. Accordingly, as proposed by petitioners, the onus of expedition would have fallen entirely on the Government, which would have had a severely limited opportunity to respond to petitioners' opening brief, and on the Court of Appeals, whose conscientious attempts during the preceding two months—by way of two prehearing conferences and numerous

additional discussions with the parties—to manage its docket in an orderly fashion, would have been frustrated.

It is true that between May 8, 1979, and June 15, 1979, petitioners were unsuccessfully seeking reconsideration by the District Court based on newly discovered information. But that information did not affect the essentials of petitioners' legal argument in favor of expedited review of the District Court's March 26 order—*i. e.,* that ever since the order was issued, petitioners had been operating under an allegedly unconstitutional and irreparably injurious prior restraint against the publication of information subject to First Amendment protection. Because they chose not to make that argument to the Court of Appeals until long after it had ripened, and until they had taken close to three months to prepare their own brief on the merits, petitioners forbore any right to expedition that the Constitution might otherwise have afforded them.

The motion for leave to file a petition for writ of mandamus is

Denied.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

It is my view that the Court of Appeals, by declining to hear arguments until the conclusion of its summer recess, has unduly delayed plenary consideration of this case. And I do not agree with my Brothers that the petitioners have forfeited whatever rights to an early hearing they might otherwise have had. Our cases indicate that the proffered justification for an injunction against publication should be considered and verified or rejected by appellate courts without unnecessary delay. See *New York Times Co.* v. *United States,* 403 U. S. 713 (1971); *United States* v. *Thirty-seven Photographs,* 402 U. S. 363 (1971); *Freedman* v. *Maryland,* 380 U. S. 51 (1965); cf. *National Socialist Party* v. *Skokie,* 432 U. S. 43 (1977); *Nebraska Press Assn.* v. *Stuart,* 423 U. S. 1319 (1975) (BLACK-

MUN, J., in chambers); *Nebraska Press Assn.* v. *Stuart,* 423 U. S. 1327 (1975) (BLACKMUN, J., in chambers). As I see it, the Court of Appeals should schedule a hearing herein at the earliest date that is both practicable and consistent with mature consideration of the questions involved. I would have preferred the Court to have reached and stated this conclusion and then, on the assumption that the Court of Appeals would follow this Court's suggestion, to have withheld the issuance of the writ of mandamus. See *Connor* v. *Coleman,* 440 U. S. 612, 613–614 (1979); *Connor* v. *Coleman,* 425 U. S. 675, 679 (1976); *Bucolo* v. *Adkins,* 424 U. S. 641, 644 (1976); *Deen* v. *Hickman,* 358 U. S. 57, 58 (1958); cf. *National Socialist Party* v. *Skokie, supra,* at 44; *Nebraska Press Assn.* v. *Stuart, supra,* at 1325–1326. Of course, with or without advancement of the hearing schedule in the Court of Appeals, the petitioners, pursuant to 28 U. S. C. § 1254 (1), may request this Court to grant certiorari prior to judgment in the Court of Appeals.

MOORE *v.* DUCKWORTH, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78–5795. Decided July 2, 1979

Petitioner, who, upon a plea of not guilty by reason of insanity, was found guilty of second-degree murder by an Indiana jury, sought federal habeas corpus relief after the Indiana Supreme Court affirmed the conviction, claiming, *inter alia*, that he had been denied due process because he had been convicted upon evidence insufficient to prove beyond a reasonable doubt that he was sane at the time of the killing. The District Court denied the writ, and the Court of Appeals affirmed, holding that a challenge to the sufficiency of the evidence presents a federal due process issue "only where a state court conviction is totally devoid of evidentiary support."

Held: Although a state prisoner is entitled to a determination whether the record evidence could support a finding of guilt beyond a reasonable doubt, *Jackson* v. *Virginia*, *ante*, p. 307, nevertheless a remand for further consideration in light of *Jackson* is inappropriate here. The Court of Appeals properly deferred to a rule of Indiana law permitting sanity to be established by either expert or lay testimony, and although that court applied an improper legal standard in considering the due process claim, it appears that such claim concerned the above Indiana rule and that the evidence in support of the conviction was constitutionally adequate under the *Jackson* standard.

Certiorari granted; 581 F. 2d 639, affirmed.

PER CURIAM.

Upon a plea of not guilty by reason of insanity, the petitioner was found guilty by an Indiana jury of murder in the second degree. The Indiana Supreme Court upon direct appeal affirmed the conviction. *Moore* v. *State*, 260 Ind. 154, 293 N. E. 2d 28 (1973). The petitioner then sought a writ of habeas corpus in a Federal District Court pursuant to 28 U. S. C. § 2254. He claimed, *inter alia*, that he had been denied due process of law because he had been convicted upon evidence allegedly insufficient to prove beyond a reasonable

doubt that he was sane at the time the victim was killed.* The District Court denied the writ, and the Court of Appeals for the Seventh Circuit affirmed. 581 F. 2d 639 (1978).

In holding that the District Court had been correct in rejecting the petitioner's challenge to the sufficiency of the evidence supporting his conviction, the Court of Appeals stated that such a challenge presents a federal due process issue "only where a state court conviction is totally devoid of evidentiary support." *Id.*, at 642. The petitioner claims that this was error, and he urges that under *In re Winship*, 397 U. S. 358 (1970), a state prisoner is entitled to a determination whether the record evidence could support a finding of guilt beyond a reasonable doubt. We agree. *Jackson* v. *Virginia*, *ante*, p. 307. Nonetheless, under the circumstances of this case we conclude that a remand for further consideration in light of *Jackson* v. *Virginia* would be inappropriate.

The petitioner has contended that the prosecution failed to meet its burden because it relied upon lay witnesses to prove sanity without providing any expert testimony to rebut his expert opinion testimony. But, as the Court of Appeals noted, under Indiana law sanity may be established by either expert or lay testimony. The state appellate court, in an opinion thoroughly discussing the record evidence and the petitioner's sufficiency challenge, concluded that the lay evidence in this case could have been credited by the jury, and it held that the State's evidence was fully sufficient to support a jury finding beyond a reasonable doubt that the petitioner was sane at the time of the killing.

The Court of Appeals properly deferred to the Indiana law governing proof of sanity. Although that court applied an improper legal standard when it considered the petitioner's

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*The District Court found, and the Court of Appeals agreed, that the petitioner had failed to exhaust his available state remedies on all but his challenge to the sufficiency of the evidence. The petitioner takes issue with this ruling, but we are satisfied that it was correct.

due process claim, it is clear from its opinion that the essence of that challenge concerned the rule of state law that permits the State to rely on lay proof of sanity. It is likewise clear from the record that under the standard enunciated in *Jackson* v. *Virginia,* the evidence in support of this conviction was constitutionally adequate.

Accordingly, the writ of certiorari is granted, and the judgment of the Court of Appeals is affirmed.

It is so ordered.

Reporter's Note

The next page is purposely numbered 901. The numbers between 715 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 25 THROUGH AUGUST 30, 1979

JUNE 25, 1979

Affirmed on Appeal

No. 76–6718. FRENCH *v.* BLACKBURN. Affirmed on appeal from D. C. M. D. N. C. Reported below: 428 F. Supp. 1351.

No. 78–449. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* STEVENS ET AL. Affirmed on appeal from D. C. N. D. Ohio. *Califano* v. *Westcott, ante,* p. 76. Reported below: 448 F. Supp. 1313.

No. 78–603. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* BROWNE ET AL. Appeal from D. C. E. D. Pa. Motion of appellee Mary Browne for leave to proceed *in forma pauperis* granted. Judgment affirmed. *Califano* v. *Westcott, ante,* p. 76.

Appeals Dismissed

No. 78–1614. SCHOOL DISTRICT OF PITTSBURGH *v.* DEPARTMENT OF EDUCATION OF PENNSYLVANIA ET AL.; and

No. 78–1620. PEQUEA VALLEY SCHOOL DISTRICT *v.* DEPARTMENT OF EDUCATION OF PENNSYLVANIA ET AL. Appeals from Sup. Ct. Pa. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS would note probable jurisdiction and set cases for oral argument. Reported below: 483 Pa. 539, 397 A. 2d 1154.

No. 78–5658. WILLIE *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 360 So. 2d 813.

No. 78–1638. WOMACK *v.* CITY OF NORFOLK. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would treat the appeal as a petition for certiorari, as does the Court, and would grant certiorari and reverse the conviction.

Vacated and Remanded on Appeal

No. 78–5373. WASHINGTON *v.* TEXAS. Appeal from County Ct. at Law No. 1, Travis County, Tex. Motion of appellant for leave to proceed *in forma pauperis* granted, judgment vacated, and case remanded for further consideration in light of *Brown* v. *Texas, ante,* p. 47.

Certiorari Granted—Vacated and Remanded

No. 78–162. RGP, INC., ET AL. *v.* OMAHA INDIAN TRIBE ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wilson* v. *Omaha Indian Tribe,* 442 U. S. 653 (1979). Reported below: 575 F. 2d 620.

No. 78–600. PERCY, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF WISCONSIN *v.* TERRY. Sup. Ct. Wis. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Parham* v. *J. R.,* 442 U. S. 584 (1979), and *Greenholtz* v. *Inmates of Nebraska Penal Complex,* 442 U. S. 1 (1979). Reported below: 84 Wis. 2d 693, 267 N. W. 2d 380.

No. 78–1136. CALIFORNIA *v.* P. S. W. Ct. App. Cal., 2d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Fare* v. *Michael C.,* 442 U. S. 707 (1979). Reported below: 84 Cal. App. 3d 520, 148 Cal. Rptr. 735.

No. 78–567. ROBBINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arkansas* v. *Sanders*, 442 U. S. 753 (1979).

No. 78–1273. NATIONAL JEWISH HOSPITAL & RESEARCH CENTER *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Baptist Hospital, Inc.*, 442 U. S. 773 (1979). Reported below: 593 F. 2d 911.

No. 78–1398. SHIFFRIN ET AL. *v.* BRATTON ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979). Reported below: 585 F. 2d 223.

No. 78–5617. MCKENZIE *v.* MONTANA. Sup. Ct. Mont. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Reported below: 177 Mont. 280, 581 P. 2d 1205.

No. 78–6179. WHISENHUNT *v.* GEORGIA. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), and *Ulster County Court* v. *Allen*, 442 U. S. 140 (1979). Reported below: 146 Ga. App. 571, 246 S. E. 2d 691.

Miscellaneous Orders

No. D–155. IN RE DISBARMENT OF REAVES. Disbarment entered. [For earlier order herein, see 440 U. S. 932.]

No. A–1021 (78–1749). BLAKLEY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Application for bail, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

Certiorari Granted

No. 78–1654. BRANTI *v.* FINKEL ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 598 F. 2d 609.

Certiorari Denied. (See also Nos. 78–1638 and 78–5658, *supra.*)

No. 77–6956. CHANEY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 570 F. 2d 1391.

No. 78–493. REDINGTON, TRUSTEE *v.* TOUCHE ROSS & CO. ET AL.; and

No. 78–526. SECURITIES INVESTOR PROTECTION CORP. *v.* TOUCHE ROSS & CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 592 F. 2d 617.

No. 78–1081. DAWSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 78–1441. BANTA ET AL. *v.* FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 588 F. 2d 235.

No. 78–1765. SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES AND CANADA, AN ILLINOIS CORPORATION, ET AL. *v.* SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES AND CANADA, A RELIGIOUS BODY, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 74 Ill. 2d 574, 387 N. E. 2d 285.

No. 78–5041. PHILLIPS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 563 S. W. 2d 47.

No. 78–5712. DE MARCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–6283. ADAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 62 Ill. App. 3d 1105, 382 N. E. 2d 889.

No. 78–6730. GUNTER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 576 S. W. 2d 518.

No. 77–1032. CITY OF COLUMBUS ET AL. *v.* LEONARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 565 F. 2d 957.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

Respondents were dismissed from their positions with the Columbus Police Department on May 31, 1971, for deliberately removing the American flag emblem from their uniforms during a public demonstration. Four days later, respondents requested hearings before the Police Hearing Board, a state-created board to which officers could appeal their discharges. Counsel for respondents informed city officials that respondents "are anxious to have a hearing on these matters and request that all efforts be made to give us an early hearing date." The Deputy Chief of Police responded by promptly notifying respondents that a "Police Hearing Board will be scheduled in the near future to hear your appeal and you will be notified of the time, date and place the hearing will be conducted." Only a week after receiving the letter granting their request for a Police Hearing Board, respondents, apparently not satisfied to invoke only the state review process, also filed the federal civil rights action now before us. Respondents claimed, *inter alia*, that the failure to accord them a hearing before they were discharged violated both their Fourteenth Amendment right to due process *and* Columbus City Ordinance No. 71–7 (1971).[1]

[1] The second prayer of the respondents' complaint asked:

"2. That, this Court exercise its pendent jurisdiction and Chief of Police, B. F. McGuffey be preliminarily and permanently enjoined from dis-

Hearings were initially scheduled before the Police Hearing Board for June 28, 1971, but, at the request of respondents' counsel, postponed until mid-July. The dismissals of respondents Leonard and White were unanimously upheld by the Board; the remaining dismissals were upheld on 4–2 votes. Although review of the Board's decisions was clearly available in state court, see *Ball* v. *Police Committee of City of Atlanta*, 136 Ga. App. 144, 145, 220 S. E. 2d 479, 480 (1975), respondents chose not to avail themselves of the further state proceedings. Instead, having lost in the first stage of the state remedial process, respondents decided to change horses and pursue their action in federal court.

On April 17, 1975, the District Court for the Middle District of Georgia dismissed respondents' federal action. The District Court ruled that respondents could not pursue state remedies part way and then switch in midstream to a federal forum; having chosen initially to invoke state remedies, that route must be exhausted.

> "[Respondents] seek to relitigate the same cause of action, based on the same set of facts, merely by changing legal theories and sovereignties. They do so despite the availability of a state process of judicial review of decisions of quasi-judicial tribunals such as the Police Hearing Board."

Dismissal of respondents' complaint was also supported by federal principles of abstention, since respondents claim for relief relied in part

> "on the alleged misapplication of a local ordinance which

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charging plaintiffs . . . on the grounds that he lacks the power or authority under City of Columbus Ordinance 71–7 to discharge police officers summarily as he did on May 31, 1971, and enjoin the Chief of Police, the Police Department and all other defendants from refraining to reinstate said plaintiffs and from withholding back pay from May 31, 1971."

Petitioners also claimed that their dismissals violated their First Amendment rights of speech, association, and petition.

> [respondents] ask this Court to construe in their prayers for relief. The present federal action seeking reinstatement would have been obviated had the [respondents] prevailed in their view before any of the four levels of state tribunals available to them."

The Court of Appeals for the Fifth Circuit reversed, holding, without detailed analysis, that the District Court should have reached the merits of respondents' claims. 565 F. 2d 957.

Petitioners contend, among other arguments, that respondents should be required to exhaust their state remedies before filing an action under 42 U. S. C. § 1983 and that the District Court therefore properly dismissed the action. In *Monroe* v. *Pape,* 365 U. S. 167 (1961), this Court held that one seeking redress for the deprivation of federal rights need not *initiate* state proceedings before filing an action under § 1983. 365 U. S., at 183. Here, however, we are confronted by a quite different and unanswered exhaustion issue—"that of the deference to be accorded state proceedings *which have already been initiated* and which afford a competent tribunal for the resolution of federal issues." Cf. *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592, 609-610, n. 21 (1975) (emphasis added). The District Court held that dismissal was in order under a doctrine that is best described as "they who invoke must also exhaust." Such a rule is not precluded by our prior decisions and indeed would seem to be supported by the logic of prior opinions. I would therefore grant certiorari to consider whether the Court of Appeals erred when it concluded that the District Court should have reached the merits of respondents' action.

Principles of federal-state comity have given rise to a number of limitations on the exercise of federal jurisdiction over state laws and actions. The equitable restraint doctrine enunciated in *Younger* v. *Harris,* 401 U. S. 37 (1971), holds that, absent "exceptional circumstances," a federal court should not interfere with pending state criminal or civil

proceedings in which the State has an important interest.[2] See, *e. g.*, *Huffman* v. *Pursue, Ltd., supra; Juidice* v. *Vail*, 430 U. S. 327 (1977); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Moore* v. *Sims*, 442 U. S. 415 (1979).

The federal action must be dismissed not only where it threatens to interfere with active state proceedings but also where state proceedings have ended because of the failure of the federal plaintiff to appeal an adverse state decision. In *Huffman* v. *Pursue, Ltd., supra*, for example, a state trial court ordered the respondent's theater closed and all personal property used in its operation seized and sold. Rather than appealing this decision, the respondent brought a § 1983 action in federal court seeking to enjoin enforcement of the state court's judgment. We held that the Federal District Court's action in granting the injunction was improper under *Younger*. Even though the state trial court judgment might have become final, "a necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." 420 U. S., at 608.

> "Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Inter-

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[2] As noted in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 600–601 (1975), in *Younger* we recognized that the doctrine of equitable restraint "is based in part on the traditional doctrine that a court of equity should stay its hand when a movant has an adequate remedy at law, and that it 'particularly should not act to restrain a criminal prosecution.' [401 U. S.,] at 43. But we went on to explain that this doctrine 'is reinforced by an even more vital consideration,' an aspect of federalism which we described as

"'the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' *Id.*, at 44."

vention at the later stage is if anything more highly duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of state appellate courts. . . .

"Federal post-trial intervention, in a fashion designed to annul the results of a state trial, also deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction. We think this consideration to be of some importance because it is typically a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. Especially is this true when, as here, the constitutional issue involves a statute which is capable of judicial narrowing. In short, we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts." *Id.*, at 608–609.

Here, the state proceedings were initiated by respondents rather than by the State. But this only strengthens the rationale for requiring respondents to exhaust their state appellate remedies. Respondents invoked the resources of the State to vindicate what they believed to have been illegal dismissals. Having lost the first round of this contest, they should not be allowed to abandon it and transfer the contest to another arena. As in *Huffman*, such belated forum shifting is "highly duplicative" and "a direct aspersion on the capabilities and good faith of state appellate courts." Action by a federal district court also would deprive the state appellate courts "of a function which quite legitimately is left to them."

A requirement that respondents exhaust state remedies that they have themselves initiated is particularly appropriate here

where respondents' claim for relief rests in part on state law. On appeal, the Georgia courts may well have found that the dismissal of respondents without a hearing was unlawful under Columbus City Ordinance No. 71–7 (1971), obviating much, if not all, of respondents' federal claim for relief and avoiding the federal constitutional issues that the District Court may now have to decide. In *Boehning* v. *Indiana Employees Assn.*, 423 U. S. 6 (1975), a discharged employee brought suit in federal court under § 1983 alleging procedural due process violations even though "controlling state statutes, as yet unconstrued by the state courts, might require the hearing demanded . . . and so obviate decision on the constitutional issue." 423 U. S., at 6. We held that under these circumstances the District Court properly decided to "abstai[n] until construction of the Indiana statutes had been sought in the state courts." *Ibid.* The similar abstention concerns present here, in combination with respondents' invocation of their state remedies, support the District Court's dismissal of respondents' action because of their failure to exhaust state appellate remedies.

As noted earlier, *Monroe* v. *Pape* is not to the contrary. In *Monroe*, we merely held that a federal plaintiff need not *initiate* state proceedings before filing a § 1983 action. According to the Court, this conclusion flowed from the purpose of the Civil Rights Act "to provide a federal remedy where the state remedy, though adequate in theory, *was not available in practice.*" 365 U. S., at 174 (emphasis added). Here, after deliberately invoking state review proceedings, respondents should not be heard to challenge the state procedures as either "not available in practice" or otherwise inadequate. Nor indeed have respondents attempted to raise such a challenge.

Quite apart from this distinction, the time may now be ripe for a reconsideration of the Court's conclusion in *Monroe* that the "federal remedy is supplementary to the state remedy, and

the latter need not be first sought and refused before the federal one is invoked." *Id.*, at 183. As noted earlier, the Court believed that this conclusion followed from the purpose of the Civil Rights Act "to provide a federal remedy where the state remedy, though adequate in theory, *was not available in practice.*" *Id.*, at 174 (emphasis added). But this purpose need not bar exhaustion where the State can demonstrate that there is an available and adequate state remedy. Indeed, scholarly commentators have soundly criticized the Court for holding to the contrary. See, *e. g.*, Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv. L. Rev. 1486 (1969). In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 663 (1978), the Court, in examining another section of *Monroe* v. *Pape*, "overrule[d] *Monroe* v. *Pape* . . . insofar as it holds that local governments are wholly immune from suit under § 1983." The Court having reopened that portion of *Monroe* v. *Pape*, I would take the opportunity afforded by this case to reconsider the Court's conclusion as to exhaustion of state remedies. Not only is the Court's conclusion open to serious question, as noted earlier, but the conclusion was reached in an almost off-the-cuff manner, in distinct contrast to that portion of *Monroe* overruled by the Court in *Monell*.

For all of these reasons, I dissent from the denial of certiorari.

No. 77–1481. WEEKS ET AL. *v.* SIMPSON. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST would grant certiorari. Reported below: 570 F. 2d 240.

No. 78–971. UNITED STATES *v.* STEVIE ET AL. C. A. 8th Cir. Motion of respondent Robert C. Stevie for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 582 F. 2d 1175.

No. 78–699. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MATTERN. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 582 F. 2d 248.

No. 78–5504. TAMILIO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 63 App. Div. 2d 744, 405 N. Y. S. 2d 284.

No. 78–6058. SINK *v.* UNITED STATES; and

No. 78–6088. GRIM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 586 F. 2d 1041.

No. 78–6076. DESANTIS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 46 N. Y. 2d 82, 385 N. E. 2d 577.

No. 78–6150. MINER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 46 N. Y. 2d 181, 385 N. E. 2d 1046.

No. 78–6319. GUZMAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 362 So. 2d 744.

No. 78–6518. MCKENZIE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: See 177 Mont. 280, 581 P. 2d 1205.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

JUNE 26, 1979

Dismissal Under Rule 60

No. 78–1436. UNION LIGHT, HEAT & POWER CO. ET AL. *v.* RUBIN, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 60.

JUNE 27, 1979

Miscellaneous Orders

No. A–1084. GOLDEN ET AL. *v.* BARR ET AL. Application for stay of proceedings in the California state courts as to the United Methodist Church, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

No. A–1089. WOE ET AL. *v.* NEBRASKA STATE DEPARTMENT OF PUBLIC WELFARE ET AL. Application to vacate stay entered May 25, 1979, by the United States Court of Appeals for the Eighth Circuit, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

JUNE 28, 1979

Dismissal Under Rule 60

No. 78–1646. STANDARD BRANDS, INC. *v.* GENERAL WAREHOUSEMEN & HELPERS LOCAL 767, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 579 F. 2d 1282.

JULY 2, 1979

Appeal Dismissed

No. 78–155. PHILADELPHIA NEWSPAPERS, INC., ET AL. *v.* JEROME, JUDGE; SOCIETY OF PROFESSIONAL JOURNALISTS ET AL.

v. BROWN, JUDGE; MONTGOMERY PUBLISHING CO. *v.* BROWN, JUDGE; SOCIETY OF PROFESSIONAL JOURNALISTS ET AL. *v.* HONEYMAN, JUDGE; and MONTGOMERY PUBLISHING CO. *v.* HONEYMAN, JUDGE. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 478 Pa. 484, 387 A. 2d 425.

Certiorari Granted—Affirmed. (See No. 78–5795, *ante*, p. 713.)

Certiorari Granted—Vacated and Remanded

No. 78–973. HARRINGTON ET AL. *v.* UNITED STATES;

No. 78–987. DOLMAN ET AL. *v.* UNITED STATES; and

No. 78–1212. MINNICH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, *ante*, p. 658. Reported below: 584 F. 2d 876.

No. 78–1015. BALDWIN ET AL. *v.* MILLS ET AL. Sup. Ct. Fla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jones* v. *Wolf*, *ante*, p. 595. Reported below: 362 So. 2d 2.

No. 78–1144. LEONARD M. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Jackson* v. *Virginia*, *ante*, p. 307. MR. JUSTICE STEVENS dissents. Reported below: 85 Cal. App. 3d 887, 149 Cal. Rptr. 791.

Probable Jurisdiction Noted

No. 78–1840. CITY OF ROME ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Reported below: 472 F. Supp. 221.

Certiorari Denied

No. 78–781. SPECIAL SCHOOL DISTRICT No. 1, MINNEAPOLIS, MINNESOTA, ET AL. *v.* BOOKER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 585 F. 2d 347.

No. 78–795. EMPRESA LINEAS MARITIMAS ARGENTINAS *v.* SAMUELS. C. A. 5th Cir. Certiorari denied. Reported below: 573 F. 2d 884.

No. 78–897. AUSTIN INDEPENDENT SCHOOL DISTRICT *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 910.

No. 78–6127. ELEUTERIO *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 194.

No. 78–1041. HOPKINS, CORRECTIONS DIRECTOR *v.* FABRITZ. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 583 F. 2d 697.

No. 78–1131. BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. *v.* HAYCRAFT ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST would grant certiorari. Reported below: 585 F. 2d 803.

No. 78–1922. AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL. *v.* KAHN, CHAIRMAN, COUNCIL ON WAGE AND PRICE STABILITY, ET AL. C. A. D. C. Cir. Motion to dispense with printing petition and to expedite consideration granted. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 199 U. S. App. D. C. 300, 618 F. 2d 784.

JULY 28, 1979

Miscellaneous Order

No. A–89 (78–610). COLUMBUS BOARD OF EDUCATION ET AL. *v.* PENICK ET AL., *ante*, p. 449. Motion to issue judgment, or in the alternative to vacate stay, presented to MR. JUSTICE WHITE, and by him referred to the Court. It is ordered that the stay entered by MR. JUSTICE REHNQUIST on August 11, 1978 [439 U. S. 1348], be vacated. It is further ordered that the judgment of this Court shall issue forthwith. MR. JUSTICE REHNQUIST took no part in the consideration or decision of these orders.

AUGUST 8, 1979

Dismissal Under Rule 60

No. 79–14. PACIFIC FAR EAST LINE, INC. *v.* ZIRPOLI, U. S. DISTRICT JUDGE (R. J. REYNOLDS TOBACCO CO. ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari dismissed under this Court's Rule 60.

AUGUST 22, 1979

Miscellaneous Order

No. A–2 (79–145). CALIFORNIA *v.* MINJARES. Application for recall and stay of mandate of the Supreme Court of California, addressed to MR. JUSTICE BLACKMUN and referred to the Court, denied. MR. JUSTICE BLACKMUN would grant the application.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting from denial of stay.

In the ordinary case, anything more than the most summary statement of the reasons of an individual Justice for dissenting from the disposition of an application for a stay by the full Court would be both a useless and wasteful consumption of the dissenter's time. I believe, though, that this is not the ordinary case, but the culmination of a sport of fox and hound which was begun by this Court's decision in *Weeks* v. *United*

States, 232 U. S. 383 (1914), 65 years ago. So many factors material to that decision, and to *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which applied it to the States, have occurred after the rendition of these decisions that I think a re-evaluation of the so-called "exclusionary rule" enunciated by *Weeks* is overdue. Because of double jeopardy considerations, I am not prepared to state flatly that this case would not be moot as a result of a verdict of acquittal by the time this Court comes to pass on the State's petition for certiorari, and I am therefore filing this opinion as a dissent from the denial of a stay of the judgment of the Supreme Court of California suppressing evidence, the granting of which could prevent any possibility of mootness. See *Fare* v. *Michael C.*, 439 U. S. 1310 (1978) (REHNQUIST, J., in chambers).

The anomalous consequences of the exclusionary rule are readily apparent from an examination of the police conduct in this case. The officers who conducted the search were responding to a report of a robbery that had recently been committed. The robbery took place around 8:30 p. m. on December 19, 1975, at a Safeway Store in Fremont, Cal. It was committed in the presence of several witnesses by two individuals armed with handguns. One of the witnesses followed the two men, observed them get into a car, and trailed the car for several miles until he was able to identify it as a 1968 or 1969 Ford Fairlane and to write down the license number. The witness then went directly to the police station and reported what he had seen. At approximately 9 p. m., the police department broadcast a description of the getaway vehicle and its license number. Shortly thereafter, a Fremont police officer spotted a vehicle matching the description, called for backup units, and stopped the vehicle. The driver, respondent, was ordered out of the car, searched, and advised he was under arrest for robbery. He was the only person in the vehicle and fit the description of one of the suspects. The officers also searched the passenger compartment of the car,

but neither that search nor the search of respondent revealed any evidence of the crime or the whereabouts of the second robber. After an unavailing attempt to locate the key to the car's trunk, the officers had the car towed to the city corporation yard. Upon its arrival, the officers picked the lock to the trunk and discovered it contained a red tote bag. They opened the tote bag, which contained clothing similar to that described by witnesses to the robbery, three guns, and a roll of pennies in a wrapper from the bank used by Safeway.

When the officer who initially stopped the vehicle was asked why he did not obtain a warrant while "making the decision to search the car and the trunk," he stated: "Basically, I think, time. In other words, by searching without the search warrant, we would save a matter of hours." He was then asked why time was a factor at this stage, and responded: "Well, we were still looking for a second suspect." The trial court denied respondent's motion to suppress the evidence discovered in the tote bag. Respondent was convicted of two counts of first-degree robbery and was found to have been armed at the time of his arrest. The Supreme Court of California, however, reversed the conviction. It concluded that although a warrantless search of an automobile, if based on probable cause to believe that the auto contains contraband or evidence of a crime, is permissible when it takes place after the auto has been towed to a police station, *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970), a search of a container in the automobile is invalid unless the officers first obtain a warrant.

The foregoing discussion reveals that respondent was apprehended as a result of conscientious police work, and that the subsequent search of the trunk of his auto occurred in the course of an ongoing investigation, while the second suspect was still on the loose. The case is thus not one in which the officers lacked probable cause to arrest respondent and to search the trunk of his auto and the tote bag; it appears rather that "the criminal is to go free" solely because of a good-faith

error in judgment on the part of the arresting officers, who were not sufficiently prescient to realize that while it was constitutionally permissible for them to search the trunk of an automobile at the city corporation yard under the exigency exception to the warrant requirement, courts would later draw a distinction between searching the trunk and searching a tote bag in the trunk. This distinction would obtain even though it was equally likely that the tote bag contained the evidence they were looking for, and they had no reason, prior to opening the trunk, to anticipate that such evidence might be hidden from their view because it was in the tote bag.

I do not claim to be an expert in comparative law, but I feel morally certain that the United States is the only nation in the world in which the most relevant, most competent evidence as to the guilt or innocence of the accused is mechanically excluded because of the manner in which it may have been obtained. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 415 (1971) (BURGER, C. J., dissenting); see also *Stone* v. *Powell*, 428 U. S. 465, 499 (1976) (BURGER, C. J., concurring). This unique jurisprudential rule, as discussed in *Stone* v. *Powell*, imposes tremendous costs on the judicial process at criminal trials and on direct review:

> "The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. As Mr. Justice Black emphasized in his dissent in *Kaufman:*
>
> > "'A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence

> seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.' 394 U. S., at 237.
>
> "Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." *Id.*, at 489–491 (footnotes omitted).

If I am correct in this belief, the Court has made a wrong turn at some point between its decision in *Weeks*, 65 years ago, and the present case. See Burger, Who Will Watch the Watchman?, 14 Am. Univ. L. Rev. 1 (1964).

In *Weeks*, the Court held, almost casually, that evidence seized in violation of the Fourth Amendment was inadmissible against the accused at a federal criminal trial. *Weeks* was decided in 1914 when the federal Criminal Code was still a rather slim volume. The villains of the 1914 federal Code, and thus the beneficiaries of the *Weeks* rule, were smugglers, federal income tax evaders, counterfeiters, and the like. The defendant in *Weeks* itself was charged with the unlawful use of the mails to transport lottery tickets. It is quite conceivable that society can tolerate an occasional counterfeiter or smuggler going unwhipped of justice because of what seems to the great majority of the citizens of the country to be a technical violation of the rights secured to him by the Fourth Amendment to the United States Constitution. The societal reaction

could be expected to be quite different today, when *Weeks* serves to free the perpetrators of crimes affecting life and property, crimes which have traditionally been the principal responsibility of the States to enforce and administer.

In *Byars* v. *United States*, 273 U. S. 28 (1927), the Court held that "probable cause" could only be measured by objective facts known to the police officer prior to the search. The search in *Byars* was conducted pursuant to a warrant supported by the affiant's statement that he had "good reason" to believe that the defendant had intoxicating liquors and related articles in his possession. The search proved the affiant correct, producing whiskey-bottle stamps. The Court held that the search was conducted in violation of the Fourth Amendment, because under Fourth Amendment standards, it was not "material that the search was successful in revealing evidence of a violation of a federal statute." *Id.*, at 29. This result, while taken for granted today, was not inevitable. The Court certainly could have held that discovery of the articles sought is compelling evidence that the search was justified, or that any violation of the Fourth Amendment in such a case was harmless error.

In *Wolf* v. *Colorado*, 338 U. S. 25 (1949), the Court held that the Fourth Amendment was applicable to the States by incorporation through the Fourteenth Amendment. This was, and remains, a thoroughly defensible proposition. Equally defensible, was the proposition established by Mr. Justice Frankfurter's majority opinion that the exclusionary rule of *Weeks* was not a necessary concomitant of the Fourth Amendment. In a 6–3 decision, the Court held that although the Fourth Amendment applied against the States, the States were free to choose any number of means of enforcing the Fourth Amendment and were not required to adopt the exclusionary rule. Mr. Justice Frankfurter relied on Judge Cardozo's opinion in *People* v. *DeFore*, 242 N. Y. 13, 150 N. E. 585 (1926), concluding that the exclusionary rule would not be applied in New

York. Cardozo's reasoning was cogently summarized in his conclusion that there was no reason why "[t]he criminal is to go free because the constable has blundered." *Id.*, at 21, 150 N. E., at 587.

Mr. Justice Murphy wrote a dissenting opinion in which Mr. Justice Rutledge joined. (Mr. Justice Douglas dissented separately.) Mr. Justice Murphy's dissent was premised on the belief that the exclusionary rule was the only effective sanction for violations of the Fourth Amendment. He therefore concluded that application of the Fourth Amendment to the States without application of the exclusionary rule was a nullity.

Twelve years later, by a vote of 6–3 in the case of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), this Court overruled *Wolf* v. *Colorado* (MR. JUSTICE STEWART concurred in the judgment on independent grounds without reaching the Fourth Amendment issues). The Court held that the Fourteenth Amendment did incorporate the exclusionary rule and therefore adherence to that rule by the States was mandatory. The Court essentially adopted the reasoning of Mr. Justice Murphy's *Wolf* dissent, concluding that the exclusionary rule represented the only feasible means of enforcing the Fourth Amendment. The *Mapp* majority opinion, written by Mr. Justice Clark, adopted the view, espoused by Mr. Justice Murphy, that a person injured by a Fourth Amendment infraction had no effective redress available. Police officers were generally impecunious, preventing the recovery of money damages, and county prosecutors who secured the conviction through use of the illegally seized evidence would be unlikely to prosecute the police officers responsible for producing the evidence.

Mapp was decided only 18 years ago. Application of the exclusionary rule to the States is not supported by a long tradition of history in its favor. It should therefore be judged freely by its reason. Moreover, one of the central themes in the procession of cases from *Weeks* to the present day has been a continuing re-evaluation of past assumptions. Thus,

Mapp reassessed the factual and conceptual underpinnings of *Wolf* in light of intervening cases and empirical data. See 367 U. S., at 651–653. Events that have intervened in the 18 years since *Mapp* and the 65 years since *Weeks* lead me to believe that another such reassessment is in order. The justifications for a rule once found compelling may no longer withstand scrutiny.

Weeks, the seminal case on the necessity for the exclusionary rule, seemed grounded upon an interpretation of the Fourth Amendment itself. In holding that illegally seized evidence must be excluded in federal prosecutions, this Court reasoned that if illegally seized evidence were admissible, "the protection of the Fourth Amendment declaring [a] right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U. S., at 393–394. Despite *Weeks*' linkage of the exclusionary rule with the fundamental guarantees of the Fourth Amendment, this Court held in *Wolf* that the protections of the rule were not fundamental enough to merit incorporation through the Fourteenth Amendment. In *Mapp*, which overruled that portion of *Wolf*, a plurality of this Court implied that the exclusionary rule was a necessary corollary of the Fourth Amendment. See 367 U. S., at 655–657. Mr. Justice Black, in a concurrence, indicated that the Fourth Amendment had to be read in conjunction with the Fifth in order to justify the exclusionary rule. See *id.*, at 661; see also *Stone* v. *Powell*, 428 U. S., at 484 n. 21.

More recently, however, we have rejected the argument that

the Fourth Amendment mandates exclusion of evidence as a necessary corollary to its guarantees against unreasonable searches. In *Stone* v. *Powell*, for example, we "reaffirm[ed] that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . ." *Id.*, at 495 n. 37. This distinction manifests itself in those cases where we have permitted admission of illegally seized evidence because its exclusion would serve no deterrent purpose. See, *e. g.*, *United States* v. *Calandra*, 414 U. S. 338 (1974) (exclusionary rule not applicable to grand jury proceedings). Clearly, proponents of the exclusionary rule must look beyond the corners of the Fourth Amendment for support.

A direct descendant of the constitutional rationale for the exclusionary rule is the argument that the rule somehow maintains the integrity of the judiciary. This argument received a full exposition in *Elkins* v. *United States*, 364 U. S. 206 (1960). There, this Court relied upon its "supervisory power over the administration of criminal justice in the federal courts," and rejected the "silver platter" doctrine under which federal authorities prosecuted defendants with evidence seized illegally by state authorities. This practice, according to *Elkins*, made federal courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Id.*, at 223. In *Mapp*, this Court also relied upon the "judicial integrity" argument, even though we have no supervisory powers over the conduct of state courts.

There are several answers to the assertion that courts should exclude illegally seized evidence in order to preserve their integrity. First, while it is quite true that courts are not to be participants in "dirty business," neither are they to be ethereal vestal virgins of another world, so determined to be like Caesar's wife, Calpurnia, that they cease to be effective forums in which both those charged with committing criminal acts and the society which makes the charge may have a fair trial in which relevant competent evidence is received in order to determine whether or not the charge is true. As Mr. Jus-

tice Stone noted in *McGuire* v. *United States*, 273 U. S. 95, 99 (1927), "[a] criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule."

Moreover, the judicial-integrity justification has on more than one occasion failed to persuade this Court. In *United States* v. *Peltier*, 422 U. S. 531 (1975), the Court observed that it had consistently refused to apply newly announced doctrines of search-and-seizure law retroactively. In such cases, the Court has recognized that the introduction of evidence which had been seized by law enforcement officials in good-faith compliance with then-prevailing constitutional norms did not make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Similarly, in *Stone* v. *Powell*, we asserted that "[w]hile courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." 428 U. S., at 485. Although someone undoubtedly should be disciplined when a deliberate violation of the Fourth Amendment occurs, that proposition does not require the conclusion that the whole criminal prosecution must be aborted to preserve judicial integrity.

Of course, the "primary" justification for the exclusionary rule is the need for deterrence of illegal police conduct. See *Stone* v. *Powell*, 428 U. S., at 486. But since *Mapp*, various changes in circumstances make redress more easily obtainable by a defendant whose constitutional rights have been violated.

Four months prior to the decision in *Mapp*, this Court resurrected a long-dormant statute, § 1 of the Ku Klux Act, 42 U. S. C. § 1983, which gave a private cause of action for redress of constitutional violations by state officials. *Monroe* v. *Pape*, 365 U. S. 167 (1961). The subsequent developments in this area have, to say the least, expanded the reach of that statute. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), made not only the individual police offi-

cer who may have committed the wrong, and who may have been impecunious, but also the municipal corporation which employed him, equally liable under many circumstances. *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971), made individual agents of the Federal Bureau of Narcotics suable for damages resulting from violations of Fourth Amendment guarantees. In addition, many States have set up courts of claims or other procedures so that an individual can as a matter of state law obtain redress for a wrongful violation of a constitutional right through the state mechanism.

In his dissent in *Wolf* v. *Colorado,* Mr. Justice Murphy disparaged civil actions as a remedy for illegal searches and seizures. Some of his objections have been vitiated by *Monroe*'s provision of a federal forum for the dispute or by *Monell*'s provision of a deep state pocket. As for other concerns voiced by Mr. Justice Murphy, I believe that modern juries can be trusted to return fair awards in favor of injured plaintiffs who allege constitutional deprivations. If, as this Court announced in *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500 (1957), juries are capable of awarding damages as between injured railroad employees and railroads, they surely are capable of awarding damages as between one whose constitutional rights have been violated and either the agent who or the government agency that violated those rights. Thus, most of the arguments advanced as to why the exclusionary rule was the *only* practicable means for enforcing the Fourth Amendment, whether or not they were true in 1949 or 1961, are no longer correct.

The most comprehensive study on the exclusionary rule is probably that done by Dallin Oaks for the American Bar Foundation in 1970. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). According to this article, it is an open question whether the exclusionary rule deters the police from violating Fourth Amendment protections of individuals. Whether or not this

be the case, the exclusionary rule certainly deters the police and prosecuting authorities from convicting many guilty defendants.

There is no question that the police are badly in need of rules that may be relatively easily understood in carrying out their work of apprehending and assisting in convicting those guilty of conduct made criminal by the legislature. There is equally no doubt that those who have been damaged by official action infringing on rights guaranteed them by the Constitution should have an avenue for redress of that damage. But it does not at all follow from either of these statements that the forum for redress of the individual's rights and the forum in which the police officer learns of the limitations on his authority should be one and the same. It would be quite rational, I think, for the criminal trial to take place either without any application of the exclusionary rule in either federal or state cases, or at least without any application in state cases. A difference in approach between state and federal prosecutions could be justified on the basis of the different roles that state and federal law enforcement officials play in our society, even today. See, *e. g.*, *Cady* v. *Dombrowski*, 413 U. S. 433, 440–441 (1973). Not only has the list of federal criminal statutes greatly expanded since 1914, but also crimes against person and property—the traditional common-law crimes—have largely remained the preserve of the State. Thus, *Mapp* v. *Ohio* brought to bear in favor of accused murderers and armed robbers a rule which had previously largely had an application to bootleggers and purveyors of stolen lottery tickets through the mail. This difference is not without force in any reasoned perception by the members of the society of how well the system of administration of criminal justice as a whole is working.

The reasons for applying the exclusionary rule in the criminal trial, as opposed to giving the individual criminal defendant redress in some other forum quite apart from the question whether he is guilty or not of the criminal charges,

are substantially weaker today than they were either in 1949, when *Wolf* v. *Colorado* was decided, or in 1961, when *Mapp* v. *Ohio* was decided. Given these changes, I would grant the stay and request the parties and the Solicitor General to brief the question of whether, and to what extent, the so-called "exclusionary rule" of *Weeks* v. *United States* should be retained.

AUGUST 30, 1979

Dismissal Under Rule 60

No. 78–1695. ANGELA COMPANIA NAVIERA, S. A. *v.* PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 592 F. 2d 58.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 928 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

PACIFIC TELEPHONE & TELEGRAPH CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.

ON APPLICATION FOR STAY

No. A-101. Decided August 13, 1979*

Applications to stay, pending disposition of applicants' petitions for certiorari, the Court of Appeals' mandate issued upon affirming the District Court's denial of declaratory and injunctive relief against enforcement of a rate order earlier promulgated by respondent California Public Utilities Commission which ordered applicants to refund certain charges paid by subscribers and to reduce certain rates, are denied, and a previously issued temporary stay is dissolved. This Court previously denied applicants' petitions for certiorari (and rehearing) to review the Commission's rate order after the California Supreme Court had denied applicants' request for review, and the applicants simply seek to relitigate federal tax issues that were determined adversely to them in such earlier proceedings, there being no intervening events to change that outcome.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants request that I continue in effect a temporary injunction issued by the Court of Appeals for the Ninth Circuit on April 2, 1979, pending disposition by the full Court of their petitions for certiorari to review the judgment of the Court of Appeals. On July 18, that court, in a consolidated case in which both applicants were appellants, affirmed the judgment of the United States District Court for the Northern District of California denying applicants injunctive relief

*Together with No. A-102, *General Telephone Co.* v. *Public Utilities Commission of California et al.*, also on application for stay of the same mandate.

against the enforcement of a rate order earlier promulgated by respondent California Public Utility Commission (PUC). The PUC in September 1977 (Decision No. 87838), had ordered applicants to refund charges paid by subscribers before 1978 and to reduce certain of their rates for that and future years. The PUC, however, stayed implementation of its order pending judicial review. 600 F. 2d 1309, 1310 (CA9 1979).

After the Supreme Court of California denied applicants' request for review, applicants petitioned this Court for certiorari. Applicants argued that this Court should review the PUC rate order because it was premised on the PUC's interpretation of an unsettled question of federal tax law. They claimed that if this interpretation subsequently proved incorrect, they would be subject to substantial liability in back taxes. Applicant Pacific Telephone also challenged the PUC's decision on the ground that it violated the Due Process Clause of the Fourteenth Amendment. The petitions were denied on December 11, 1978, 439 U. S. 1052, with MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN dissenting from the order of denial. Petitions for rehearing were thereafter denied on February 21, 1979, 440 U. S. 931. On March 14, 1979, the PUC terminated the stay of its own order of September 13, 1977, stating in its order so doing that "the avenues of judicial review have been exhausted." 600 F. 2d, at 1311. The following day, applicants filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of California. That court denied relief, but the Court of Appeals granted its own temporary injunction on April 2, 1979, pending consideration of applicants' appeal from the order of the District Court. Last month, as previously noted in this opinion, the Court of Appeals affirmed the judgment of the District Court, dissolved its own injunction, and denied applicants' request for a stay of mandate in order that they might petition this Court for certiorari.

With this sort of procedural history, one would expect

applicants' petitions for certiorari to deal principally with questions arising under the United States Constitution or laws governing the setting of rates by state utility commissions for public utilities. But the questions which applicants seek to have reviewed on certiorari pertain to the application of federal tax statutes as they relate to depreciation which may be claimed by public utilities. Since it is this type of question which applicants seek to litigate if certiorari is granted, one would likewise expect either an agency or officer of the United States having some responsibility for administering these tax statutes to be named as respondents, instead of the California PUC or intervening California municipal corporations. Without dwelling further on the anomalous nature of applicants' petitions for certiorari, I have concluded that their actions in the United States District Court for the Northern District of California begun in March 1979, were simply an effort to relitigate issues which had been determined adversely to them by the administrative and judicial processes of the State of California, and with regard to which this Court denied certiorari and denied rehearing earlier this Term. These denials took place notwithstanding the fact that the Solicitor General urged the Court to grant certiorari and decide the issues presented by the petitions.

The PUC in its Decision No. 90094, rendered on March 14, 1979, after the proceedings in this Court, was doing no more than formally stating that the conditions on which its stay had been granted—exhaustion of judicial review—had occurred, and therefore the stay expired by its own terms. The PUC dissolved this stay despite applicants' contention that the PUC's interpretation of federal tax law in Decision No. 87838 was incorrect and that the rate order would consequently result in the Internal Revenue Service's assessment of substantial tax deficiencies against applicants. In my opinion, the determination of whether or not the PUC's rate order should have been stayed pending resolution of the federal tax issues

was, at this late stage in the proceedings, entirely a matter for the State to decide.

One need not question the assertion of applicants that very large financial stakes hinge on the manner in which the IRS, subject to whatever review of its action is provided by law, treats the refund and rate reduction orders imposed by the PUC's order of September 13, 1977. Nor need one doubt that this Court had jurisdiction, under cases such as *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977), to review applicants' earlier petitions for certiorari in Nos. 78–606 and 78–607, O. T. 1978, on the ground that the PUC had reached a decision based on a misapprehension of federal law which it might not have reached had it correctly understood federal law. But that is now water over the dam. This Court denied those petitions earlier this Term, and denied petitions for rehearing.

If I thought it necessary in passing upon this stay application to determine the present-day correctness of this Court's reading of California law in *Napa Valley Co.* v. *Railroad Comm'n*, 251 U. S. 366 (1920), I would naturally defer to the opinion of the Court of Appeals, which must deal with California law more frequently than does this Court. But I do not actually think it is necessary to make this determination; a State may enunicate policy through an administrative agency, as well as through its courts, and so long as there is an opportunity for judicial review the fact that such review may be denied on a discretionary basis does not make the agency's action any less the voice of the State for purposes of this Court's jurisdiction or for purposes of federal-state comity. See *United States* v. *Utah Construction Co.*, 384 U. S. 394, 419–423 (1966). Nor is this a case where any claim of bias is made against the agency, see *Gibson* v. *Berryhill*, 411 U. S. 564 (1973), or where an action of the federal courts in refusing to allow applicants to relitigate the merits of their claim on which this Court has previously denied certiorari amounted

to the imposition of a requirement of "exhaustion of administrative remedies." Here, the administrative action was the source of the claimed wrong, not a possible avenue for its redress.

The net of it is that I believe applicants' federal-court litigation is new wine in old bottles. When it was new wine in new bottles, last Term, this Court denied certiorari, and I have no reason to believe that any intervening events would change that outcome. Accordingly, without considering the second part of the requirement which applicants must meet in order to obtain a stay—the so-called "stay equities"—the temporary stay which I previously issued is dissolved forthwith, and applicants' request for a stay of the mandate of the Court of Appeals for the Ninth Circuit is hereby

Denied.

LENHARD ET AL., CLARK COUNTY DEPUTY PUBLIC DEFENDERS, INDIVIDUALLY AND AS NEXT FRIENDS OF BISHOP *v.* WOLFF, WARDEN, NEVADA STATE PRISON SYSTEM, ET AL.

ON APPLICATION FOR STAY OF EXECUTION

No. A–172. Decided September 7, 1979

A temporary stay of execution of a death sentence imposed by a Nevada trial court and affirmed by the Nevada Supreme Court is continued pending the full Court's consideration of an application by public defenders as "next friends" of the defendant, who disclaimed any effort to prevent his execution. Although there are doubts concerning the applicants' standing, particularly in view of the record evidence and lower-court findings as to the defendant's competency to waive the assertion of any constitutional infirmities in his sentence, and although the defendant has obtained full review of the death sentence and trial proceedings by the Nevada Supreme Court, which upheld the constitutionality of the Nevada capital punishment statute, doubts as to the proper course of action are resolved in favor of continuing the stay because the Circuit Justice acts as surrogate for the full Court, and because the Court will have an opportunity to consider the application at its regularly scheduled Conference the last week of the month.

MR. JUSTICE REHNQUIST, Circuit Justice.

On August 25, 1979, I temporarily enjoined respondents from executing Jesse Bishop, upon whom a death sentence was imposed by the State District Court for Clark County, Nev., and affirmed by the Supreme Court of Nevada in July 1979. I issued the injunction so that I would be able to consider the response of Nevada officials and additional information of record which I requested from each of the parties. In the exercise of what I find to be as difficult a task as must be performed by any Member of this Court—the obligation to act as surrogate for the entire Court in deciding whether to grant or deny extraordinary relief pursuant to 28 U. S. C. § 1651 pending disposition of a petition for certiorari by the

full Court—I have determined that it is appropriate to continue the stay of execution pending consideration by the full Court. Since the State of Nevada is entitled to have the mandates of its courts enforced unless they offend the laws or Constitution of the United States, and since Jesse Bishop has concededly disclaimed any effort either by himself or by others on his behalf to prevent his execution, I feel obliged to summarize briefly the reasons which lead me to refer the application to the full Court.

The defendant under sentence of death has wholly disclaimed any effort to seek a stay from this Court or to seek review of the decision of the Supreme Court of Nevada by means of certiorari in this Court. The only two comparable cases which have come before this Court are *Gilmore* v. *Utah*, 429 U. S. 1012 (1976), and *Evans* v. *Bennett*, 440 U. S. 1301, in which I granted a stay of execution on April 5, 1979, in order that the case might be considered by the full Court. The full Court thereafter vacated the stay. *Evans* v. *Bennett*, 440 U. S. 987 (1979). In each of these cases, the defendant under sentence of death had disassociated himself from efforts to secure review of that sentence.* In *Evans*, I entered the stay of execution in recognition of the fact that four Members of the Court had dissented from the ultimate denial of the stay in *Gilmore*, *supra*. While my Brothers BRENNAN and MARSHALL'S view of the death sentence as "cruel and unusual punishment" within the prohibition of the Eighth Amendment under all circumstances might permit review of any capital case by this Court, the dissenting opinions of my Brothers WHITE and BLACKMUN seem more limited in scope. Those opinions urged plenary consideration of the application to resolve doubts about the standing of Gilmore's

*In *Evans*, the Court was informally advised after the date upon which I granted the stay that Evans had authorized the prosecution of the federal habeas corpus action in the United States District Court for the Southern District of Alabama.

mother to prosecute the action without her son's consent when substantial questions regarding the constitutionality of the state statute remained unresolved. I therefore concluded in *Evans* that a stay until the regularly scheduled Conference of the Court the following week would be most consonant with my obligations as Circuit Justice.

In my view, the initial barrier to be overcome in the present case by applicants Lenhard and Franzen, who with commendable fidelity to their assignment by the trial court have sought this stay and petitioned for habeas relief in the federal courts, is the finding of the courts which have passed on the question that defendant Jesse Bishop is competent to waive the assertion of any constitutional infirmities in the sentence imposed upon him by the Nevada courts. A successful attack on Bishop's competency is the requisite threshold for applicants' standing. Even if standing were not a barrier, a view some Members of the Court may well subscribe to, applicants still would have the burden of demonstrating some constitutional deficiency in the proceedings, as I read the views of my Brother WHITE. For this reason, I have considered the nature of the judicial review afforded on the merits thus far, as well as the review afforded the determination of Bishop's competency.

At the trial court level, both Evans and Bishop pleaded guilty, whereas Gilmore was tried and sentenced by a jury. Gilmore declined to seek any appellate review in the Supreme Court of Utah, and was granted none. Evans' conviction and sentence were reviewed pursuant to a requirement for mandatory appeal in both the Alabama Court of Appeals and in the Supreme Court of Alabama. Bishop's case was comprehensively reviewed by the Supreme Court of Nevada. Evans additionally unsuccessfully sought a writ of certiorari from this Court to review the judgment of the Supreme Court of Alabama, which writ was denied on February 20, 1979. 440 U. S. 930. Thus, each of the three cases had progressed to

different levels of review within the judicial system: Gilmore had neither sought nor obtained any appellate review of the death sentence imposed upon him by the trial court; Bishop has obtained full review by the Supreme Court of Nevada of the death sentence and proceedings which led up to it in the trial court; Evans not only obtained state appellate review, but also petitioned this Court unsuccessfully for a writ of certiorari challenging the affirmance of his death sentence by the Alabama courts.

In *Gilmore,* no state or federal court had reviewed the constitutionality of the Utah statute. The Supreme Court of Nevada in reviewing Bishop's case, however, expressly upheld the constitutionality of the Nevada capital punishment statute. The court reasoned:

> "The Nevada statutes authorizing the imposition of the death penalty are similar to the Florida statutes which were found to be constitutional in *Proffitt* v. *Florida,* 428 U. S. 242 (1976). The Nevada statutes provide for a consideration of any mitigating factor the defendant may want to present. NRS 200.035 (7). Cf. *Lockett* v. *Ohio,* [438 U. S. 586 (1978)]. The imposition of the death penalty in this case offends neither the United States Constitution nor the Nevada Constitution." *Bishop* v. *Nevada,* 95 Nev. 511, 517–518, 597 P. 2d 273, 276–277 (1979).

Again, in my view, the substantive constitutional arguments which might be made by defendant Bishop in this Court in support of review of the judgment of the Supreme Court of Nevada bear only tangentially on the merits of the application for stay, since the contentions are not being made by Bishop, but rather by the public defenders asserting that they act as "next friends." But since MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in *Gilmore,* stated that "[u]ntil the state courts have resolved the obvious, serious doubts about the validity of the state statute, the

imposition of the death penalty in this case should be stayed," 429 U. S., at 1018, and MR. JUSTICE BLACKMUN stated that "the question of Bessie Gilmore's standing and the constitutional issue are not insubstantial," *id.*, at 1020, it is apparent that four Members of this Court do not consider the issue of the "standing" of a relative to assert claims which the convicted defendant refuses to assert and the merits of those claims to be wholly disassociated from one another. The constitutionality of Bishop's sentence has, in any event, been subjected to substantially greater scrutiny than the sentence imposed in *Gilmore*.

From my view of the controlling legal precepts, the record evidence of competency is more important to the determination of whether a stay is appropriate than is the merit of the underlying application. While I do not purport to have extensive knowledge of the concept of "next friend" in a legal proceeding such as this, it strikes me that from a purely technical standpoint a public defender may appear as "next friend" with as much justification as the mother of John L. Evans or of Gary Gilmore. But I do think the contrast between the position of Bishop's family in this case and that of Gilmore's mother and Evans' mother in those cases is worth noting. Here Bishop's family has by no means repudiated him, but they have at the same time declined to pursue or join in the pursuit of any further judicial review of the death sentence. While the familial relationship of the "next friend" to the defendant may not be relevant to the technical question of standing, it may provide some inferences as to the issue of competence. The refusal of the family to seek relief may well support the finding of the courts which have considered the question that the defendant is competent to waive additional proceedings.

Gilmore underwent competency proceedings both prior to trial and after he announced his intention to waive appellate review. With respect to the waiver of the latter right, the

trial judge appointed a prison psychiatrist to examine Gilmore. On the basis of a 1-hour interview the psychiatrist submitted a report to the court finding Gilmore competent to waive appeals. Reports of two prison psychologists were submitted as corroboration, and the trial judge entered a finding of competency.

Bishop was found competent to plead guilty and represent himself after an evidentiary hearing at which three examining psychiatrists reported that Bishop was competent. There has been no subsequent *judicial* determination of his competency to waive further litigation. A state-appointed psychiatrist, however—the only psychiatrist that Bishop would consent to see—submitted a report based on a 4-hour interview, concluding that Bishop is competent to waive further review. The United States District Court for the District of Nevada, in its opinion in the habeas proceeding dated August 23, 1979, stated:

> "The Court has reviewed the record of the proceedings before the Nevada Supreme Court and the Eighth Judicial District of the State of Nevada and, based thereon, finds that Jesse Walter Bishop made a knowing and intelligent waiver of any and all federal rights he might have asserted both before and after the Eighth Judicial District imposed sentence, and, specifically, that the State of Nevada's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded." Application, App. B, p. 5.

On appeal to the Court of Appeals for the Ninth Circuit, a panel of that court stated in its opinion:

> "Bishop himself has steadfastly maintained that he does not wish to seek relief in the federal courts and refuses to authorize any petition for habeas corpus or stay of execution to be filed on his behalf. Most recently he appeared in open court at the hearing before the district court on August 23, 1979 and declared that he believes

he has a constitutional right to waive any rights to a federal appeal and desires to do so. He maintained he was intelligently and competently exercising his right to refrain from seeking relief from the federal courts." 603 F. 2d 91, 93 (1979).

The Court of Appeals went on to observe that following the initial determination of competence to stand trial and plead guilty:

"[T]here has been no showing of Bishop's incompetence. . . .

"Bishop was found to be competent at the time of trial by three psychiatrists; he was observed by the panel of three judges during the penalty hearing; he was observed in a subsequent proceeding before the trial court on July 25, 1979; he appeared personally before the United States District Court on August 23, 1979; and he was examined by a licensed psychiatrist on August 21, 1979. On none of these occasions was there an indication to those responsible persons that he was incompetent. We find that there has been no evidence of incompetence sufficient to warrant a hearing on the issue." *Ibid.*

I thus find myself in much the same position in which I found myself in *Evans* v. *Bennett*. If I were casting my vote on the application for a stay as a Member of the full Court, I would vote to deny the stay. I am in full agreement with the *per curiam* opinion of Judges Wright, Sneed, and Hug of the United States Court of Appeals for the Ninth Circuit. I am likewise in full agreement with the observations of Judge Sneed in his concurring opinion suggesting that however worthy and high minded the motives of "next friends" may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case. The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, re-

gardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum,* a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

But because I am acting as surrogate for the full Court, and because the Court will have an opportunity to consider this application at its regularly scheduled Conference the last week of this month, I have resolved doubts which greatly trouble me as to my proper course of action in favor of continuing the injunction which I previously issued to and including Monday, October 1, 1979, unless previously modified or vacated by the Court.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 1976, 1977, AND 1978 (AS OF JULY 2, 1979)

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
Terms	1976	1977	1978	1976	1977	1978	1976	1977	1978	1976	1977	1978
Number of cases on dockets	8	14	17	2,324	2,341	2,379	2,398	2,349	2,335	4,730	4,704	4,731
Number disposed of during terms	2	3	0	1,852	1,911	1,954	2,064	1,953	1,985	3,918	3,867	3,939
Number remaining on dockets	6	11	17	472	430	425	334	396	350	812	837	792

	TERMS		
	1976	1977	1978
Cases argued during term	176	172	168
Number disposed of by full opinions	154	153	[1] 153
Number disposed of by per curiam opinions	22	8	[2] 8
Number set for reargument	0	9	8
Cases granted review this term	169	162	163
Cases reviewed and decided without oral argument	207	129	110
Total cases to be available for argument at outset of following term	88	75	79

[1] Includes No. 78 Orig.
[2] Includes No. 8 Orig. and No. 77-154

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peals, in affirming denial of relief here, applied an improper legal standard in considering petitioner's due process claim as to sufficiency of evidence for conviction in an Indiana murder prosecution, nevertheless case will not be remanded, since petitioner's claim concerned a state rule permitting sanity to be established by either expert or lay testimony, to which rule Court of Appeals properly deferred, and since evidence in support of petitioner's conviction was constitutionally adequate. Moore v. Duckworth, p. 713.

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2. *Death penalty.*—A temporary stay of execution of a death sentence is continued pending full Court's consideration of public defenders' application as "next friends" of defendant, who disclaimed any effort to prevent his execution. Lenhard v. Wolff (REHNQUIST, J., in chambers), p. 1306.

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VENUE.

Tender offer—Federal suit against state officials.—Under § 27 of Securities Exchange Act of 1934, venue was improper in a federal-court action in Texas by a Texas-based corporation challenging validity of Idaho statute under which defendants, state officials, had delayed date of plaintiff's tender offer to purchase stock of company having substantial assets in Idaho, plaintiff having filed documents in Idaho in an attempt to satisfy State's takeover statute; nor was venue available in Texas under 28 U. S. C. § 1391 (b), since District of Idaho, where actions forming basis for plaintiff's claim took place, is only one in which "claim arose" within meaning of § 1391 (b). Leroy v. Great Western United Corp., p. 173.

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1. *"Injury . . . caused by the negligence of a vessel."* § 5 (b), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905 (b). Edmonds v. Compagnie Generale Transatlantique, p. 256.

2. *"Injury . . . caused by the negligence of persons engaged in providing stevedoring services to the vessel."* § 5 (b), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905 (b). Edmonds v. Compagnie Generale Transatlantique, p. 256.

3. *"Intra-agency memorandums."* Exemption 5, Freedom of Information Act, 5 U. S. C. § 552 (b)(5). Federal Open Market Committee of FRS v. Merrill, p. 340.

4. *"Judicial district . . . in which the claim arose."* 28 U. S. C. § 1391 (b). Leroy v. Great Western United Corp., p. 173.

5. *"Rights, privileges, or immunities secured by the Constitution and laws."* 42 U. S. C. § 1983. Baker v. McCollan, p. 137.

WORKERS' COMPENSATION. See **Longshoremen's and Harbor Workers' Compensation Act.**

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